

(2015) 04 AHC CK 0075

In the Allahabad High Court

Case No : Matters Under Article 227 No. 1784 of 2015

Amarjeet Singh

APPELLANT

Vs

A.D.J. and Others

RESPONDENT

Date of Decision : 29-04-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6)
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 10, Order 7 Rule 11, 16, 16(b), 20
Constitution of India, 1950 — Article 227

Citation : (2015) 04 AHC CK 0075

Hon'ble Judges : Ashwani Kumar Mishra, J

Bench : Single Bench

Advocate : Arvind Srivastava, for the Appellant; Kamlesh Kumar Mishra, Advocates for the Respondent

Judgement

Ashwani Kumar Mishra, J.—This petition, under Article 227 of the Constitution of India, has been filed challenging an order passed by Additional District Judge, Gorakhpur, dated 28th February, 2015, whereby misc. appeal of the plaintiff has been allowed, and the order of the trial court for return of plaint has been set aside. A further direction has been issued by the appellate court for the proceedings of suit to continue before the court concerned.

2. Facts in brief, which have given rise to this petition, and which are not in dispute that an original suit No. 511 of 2009 has been filed by the respondent No. 2, before the court of Civil Judge (Senior Division), Gorakhpur, for dissolution of partnership agreement, dated 1.7.2003, and for distribution of assets belonging to the firm. In this suit, an objection was taken by the petitioner, under Order 7 Rule 11 of the Code of Civil Procedure, 1908, vide application dated 12th October, 2009, on two grounds. It was, firstly, submitted that the suit itself is barred at Gorakhpur, in view of Section 16 of the Code of Civil Procedure, 1908, and secondly, it was contended that there is an arbitration agreement between the parties, and therefore, on this count also, the suit is not maintainable.

3. It appears that parties thereafter initiated steps to invoke the remedy under the Arbitration Act, and ultimately, matter was taken to Punjab and Haryana High Court for appointment of an arbitrator, under Section 11(6) of the Act of 1996. This apparently was done, because all assets and properties of the firm were situated at Punjab, and some of the parties to the dispute were also residing at Punjab. This application was registered as Arbitration Case No. 127 of 2011, which was decided on 8th February, 2013. The order passed by Hon"ble The Chief Justice of Punjab and Haryana High Court, dated 8.2.2013, is relevant, and as it is not very long, the entire order is reproduced:-

"This petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of the Arbitrator in terms of clause 13 of the partnership deed dated 04.07.2003 which is annexed as Annexure A1 to the petition. As per this purported partnership deed, there are nine partners and the shareholding of each of the partners is mentioned specifically in sub para iv of para 7 of the petition.

2. The respondents No. 4 and 6 have filed the reply to this petition contesting the same. It is their submission that the partnership deed is forged document. These respondents have alleged that there was a family settlement arrived at between the parties, namely, six brothers and two sisters and their father on 14.05.2001 and the joint properties were partitioned thereby. According to these respondents, the properties which are situated in Ropar fell in their share. Certain properties which were in Gorakhpur, came to the shares of respondents No. 1 to 3 and the properties which were situated in Nalagarh fell to the share of respondent No. 5.

3. It is not necessary to take note of all these facts in detail because of the reasons that father of the petitioner herein (brother of the respondents No. 4 and 6) has already filed suit in the Court of Civil Judge (Senior Division), Gorakhpur. No doubt, in the said suit, the respondent No. 4 had earlier moved an application under Order 7 Rule 11 CPC for rejection of the plaint on certain grounds. It is stated by learned counsel for the respondents No. 4 and 6 that they are not pressing that application and instead they have even filed the written statement in the said suit as their defence remains the same in that suit also and they are contesting that the alleged partnership deed is the forged document.

4. The central focus of such a suit would be as to whether the partnership deed was in fact executed between the parties or not and other things would follow only on the outcome of this particular issue. Moreover, having regard to the documents which are submitted by learned counsels for either side, it becomes clear that this issue cannot be decided without leading evidence, as it is a waxed issue and determination thereof would need evidence which will have to be led by both the parties. For this reason itself, the present petition obviously cannot be entertained.

5. Learned counsel for the petitioner, in these circumstances, submits that the

petitioner would be satisfied if the suit pending in the Court at Gorakhpur is decided on merits and the respondents No. 4 and 6 do not press their application filed for rejection of the said suit.

6. As already noted above, learned counsel for the respondents No. 4 and 6 submits that his clients are not going to have that objection and would like to have the suit decided on merits. On the basis of this submission of learned counsel for the parties, this petition is dismissed as withdrawn subject to the observation made in the petition."

4. Pursuant to the undertaking given before the Punjab and Haryana High Court, it is undisputed that the objection raised with regard to maintainability of suit at Gorakhpur, on account of Section 16 CPC, was in fact given up by the petitioner, and consequently, the application, under Order 7 Rule 11 CPC, was rejected. As a consequence thereof, it follows that objection with regard to jurisdiction of the court at Gorakhpur to entertain the suit, on account of Section 16 CPC, was given up.

5. Thereafter, a fresh application, under Order 7 Rule 10 CPC has been filed. Objection in essence, taken in this application, is that suit is not maintainable in view of the provisions of Section 20 and 21 of CPC, and as the parties were residing at Punjab, therefore, the suit at Gorakhpur is not maintainable. This application was contested, and the trial court, vide its order dated 13th February, 2013, found substance in the contention of the defendant petitioner, and it was observed that as the partners were residing at Punjab, and no leave of the court to institute the suit in terms of Section 20(b) had been granted, as such, the suit was not maintainable. Accordingly, the plaint was returned for presentation before the appropriate court. This order has been subjected to challenge in appeal, which has been allowed, and is under challenge in this petition.

6. The appellate court has found that objection raised, relying upon the provisions of Section 16 of the Code, was specifically given up by the petitioner, and therefore, the same is no longer open to be pressed, at this stage. Appellate court has also taken note of the order passed by Punjab and Haryana High Court, wherein a specific contention of the petitioner was recorded that any challenge to the proceedings of suit on account of objection under Order 7 Rule 11 CPC would be given up. The appellate court thereafter proceeded to discuss the issue, and it was observed that according to plaint averments, some of the partners of the concerned firm were residing at Gorakhpur, and therefore, the court at Gorakhpur, had jurisdiction, and accordingly, the order passed by the trial court has been set aside.

7. Challenging the aforesaid order, Sri Arvind Srivastava, learned counsel for the petitioner contends that the suit is cleverly drafted, inasmuch as the relief in essence is with regard to determination of right or interest in immovable property, and therefore, by virtue of Section 21(b) of the Code, the suit itself was not maintainable. For the said proposition, learned counsel has relied upon a

judgment of the Apex Court, reported in Harshad Chiman Lal Modi Vs. DLF Universal and Another, AIR 2005 SC 4446 : (2006) 101 CLT 5 : (2005) 5 CTC 133 : (2005) 8 JT 561 : (2005) 7 SCALE 533 : (2005) 7 SCC 791 : (2005) AIRSCW 5369 : (2005) 6 Supreme 634 . It is further submitted that the law is settled that no amount of consent can confer jurisdiction. Submission, therefore, is that the mere factum of consent having been tendered by the petitioner before Punjab and Haryana High Court is of no consequence, and would not confer jurisdiction upon the court at Gorakhpur, as by virtue of Section 16 CPC, the suit itself was not maintainable. Learned counsel also submits that none of the partners to the firm, according to partnership agreement, are resident of Gorakhpur, and therefore, the provisions of Section 21(b) of the Code would not be attracted. He further submits that even otherwise, there is no consent of the court obtained for filing of the suit, and the jurisdiction would not be available to the court, relying upon the observations and order of the Punjab and Haryana High Court. Sri Arvind Srivastava also submits that the dispute in effect is in respect of the immovable property, and the appellate court erred in relying upon the Division Bench judgment of this Court, reported in 1919 (Allahabad) 350 (Durga Das alias Durga Prasad v. Jai Narain), wherein it has been held that a suit for dissolution of partnership with the usual ancillary relief is not a suit for the determination of any other right to or interest in immovable property. He also submits that appellate court has erroneously relied upon the judgment of Apex Court in Shyam Sunder Shaw Vs. Netai Chand Shaw, AIR 1987 SC 1421 : (1987) 2 JT 265 : (1987) 1 SCALE 822 : (1987) 3 SCC 461 : (1987) 1 UJ 609 .

8. Sri Manish Goel, learned counsel, who has stood up to defend the appellate order, submits that the arguments, which has been advanced by learned counsel for the petitioner, are not open to him. He submits that the petitioner is trying to reopen a ground, which was available and pressed into service, but was subsequently abandoned before the Punjab and Haryana High Court, and is not open to be raised now. He submits that only grounds, which have been taken in the application under Order 7 Rule 10 of CPC, is with regard to the maintainability of suit in view of Sections 20 and 21 of the Code, and the finding of the appellate court on such issues cannot be said to be erroneous or perverse, so as to require any interference.

9. Having considered the respective submissions, this Court is somewhat amused with the inconsistent stand, which has been resorted to by the petitioner. Admittedly, a suit was filed at Gorakhpur for the relief specified above. This suit was resisted on the ground that suit is not maintainable by virtue of Section 16 of the Code. The argument, which has been advanced before this Court today for the petitioner in support of objection raised under Order 7 Rule 10 CPC, again relies upon Section 16 of the Code, although such plea was in fact given up. This act of the petitioner is more surprising, once the order of the Punjab and Haryana High Court is examined. It appears that petitioner was somehow interested in scuttling an adjudication of the question raised by the respondents in the suit. Initially the objection taken was that suit is not maintainable, and

therefore, the parties ought to have gone to arbitration. Once an arbitration was invoked, then objection taken was that the proceedings for arbitration be not carried further, as the parties are already litigating in the suit. The application filed by the respondents before the Punjab and Haryana High Court for appointing arbitrator was specifically rejected, taking note of the fact that parties are already litigating their civil disputes before the court at Gorakhpur. Care was taken by the then Hon"ble Chief Justice of Punjab and Haryana High Court in specifically recording a statement of the petitioner, that objection filed with regard to jurisdiction under Order 7 Rule 11 CPC would be given up. The petitioner in furtherance of such objection has in fact given up the objection filed under Order 7 Rule 11 CPC. In fact, this Court finds that after having given up such an objection, which was available to the petitioner, the endeavour and anxiety now is to resurrect such plea, all over again. The only change is of nomenclature, inasmuch as instead of objection under Order 7 Rule 11 CPC, subsequent objection is under Order 7 Rule 10 CPC.

10. Interestingly, learned counsel for the petitioner submitted with vehemence that his objection to the maintainability of suit is with reference to Section 16 of the Code, as according to petitioner, the jurisdiction of court would be determined according to it and provisions of Section 20 would not be applicable at all. It is only the alternative submission that suit is barred under Section 20(b) of the Code. Reliance is placed upon para 13 of the Apex Court judgment reported in Begum Sabiha Sultan Vs. Nawab Mohd. Mansur Ali Khan and Others, AIR 2007 SC 1636 : (2007) 5 JT 431 : (2007) 5 SCALE 754 : (2007) 4 SCC 343 : (2007) 5 SCR 36 : (2007) AIRSCW 2488 : (2007) 3 Supreme 732 , which is reproduced:-

"13. On a reading of the plaint as a whole, it is clear, as we have indicated above, that the suit is one which comes within the purview of Section 16(b) and (d) of the Code. If a suit comes within Section 16 of the Code, it has been held by this Court in Harshad Chiman Lal Modi Vs. DLF Universal and Another, AIR 2005 SC 4446 : (2006) 101 CLT 5 : (2005) 5 CTC 133 : (2005) 8 JT 561 : (2005) 7 SCALE 533 : (2005) 7 SCC 791 : (2005) AIRSCW 5369 : (2005) 6 Supreme 634 that Section 20 of the Code cannot have application in view of the opening words of Section 20 "subject to the limitations aforesaid"."

In view of the above, it is found that objection under Order 7 Rule 10 CPC, based upon interpretation of Section 20 of the Code was not available to the petitioner. The appellate order, rejecting objection, therefore, cannot be raised to be illegal or bad in law.

11. From the materials available on record, this Court finds that the dispute, on merits, is required to be resolved. It is according to choice expressed by the petitioner that such issues are now to be adjudicated by the court at Gorakhpur. The petitioner cannot now be permitted to resile from his initial stand, and set up challenge on the question, which he has already given up. The judgments, which have been relied upon by Sri Arvind Srivastava, learned counsel for the

petitioner, would not be of much help in view of the specific stand taken by the petitioner himself, before the court. The question as to whether the suit would be maintainable by virtue of Section 16 of the Code or not, and for which various decisions have been cited, is not required to be examined in view of the fact that the petitioner has himself given up such objection. This Court, therefore, would not like to elaborately deal with the judgments relied upon by learned counsel for the petitioner, in this regard.

12. So far as the plea with regard to maintainability of suit by virtue of Section 20 of the Code is concerned, this Court finds that the appellate court has given cogent reasons in its order to hold that the suit at Gorakhpur is maintainable. Law is settled that the application under Order 7 Rule 10 CPC will have to be adjudicated with reference to the averments of plaint alone. In Begum Sabiha Sultan (supra), it is observed as under in Paragraph No. 10:-

"10. There is no doubt that at the stage of consideration of the return of the plaint under Order VII Rule 10 of the Code, what is to be looked into is the plaint and the averments therein. At the same time, it is also necessary to read the plaint in a meaningful manner to find out the real intention behind the suit. "

13. It is categorically stated in the plaint that many of the partners are residing at Gorakhpur. The defence set up by the petitioner that their residence shown in the partnership agreement is of Punjab, cannot be gone into at this stage, as what has to be seen at this stage is merely the plaint averment. Even otherwise, these are all questions of fact and such issues can be determined only at the stage of trial. The proceedings of the suit cannot be scuttled at this juncture on this ground. This Court finds that relief, which has been claimed in suit is of dissolution of partnership firm, and in view of the express consent given by the petitioner before the Punjab and Haryana High Court, it is not open for the petitioner to raise questions with regard to jurisdiction of the suit at this stage, once it has given up its objection on this count.

14. The order passed in appeal does not suffer from any error of jurisdiction, nor it has occasioned any failure of justice. The appellate order, therefore, requires no interference. The petition is, accordingly, dismissed.

15. Since the petitioner has already filed his written statement, it goes without saying that the court concerned shall proceed with disposal of suit No. 511 of 2009, in accordance with law, without granting any unnecessary adjournment to either of the parties.