
(1979) 02 RAJ CK 0024

In the Rajasthan High Court

Case No : Civil Miscellaneous Appeal No. 77 of 1978

Bhonrilal Hiralal and Others

APPELLANT

Vs

Prabhu Dayal and Another

RESPONDENT

Date of Decision : 09-02-1979

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : AIR 1980 Raj 9 : (1979) RLW 110

Hon'ble Judges : N.M. Kasliwal, J

Bench : Single Bench

Advocate : M.B.L. Bhargava and A.K. Bhandari, for the Appellant; B.P. Agrawal, for the Respondent

Final Decision : Dismissed

Judgement

N.M. Kasliwal, J.—This is an appeal by the defendants against an order of the learned Additional District Judge, Alwar, dated 1st May, 1978, whereby he rejected the application filed u/s 34 of the Arbitration Act and refused to stay the proceedings of the Civil Suit.

2. Brief facts giving rise to this appeal are that on 29th March, 1976, Pra-bhu Dayal s/o Bhonrey Lal and Raghu-nandan s/o Prabhu Dayal filed a suit for the dissolution of the firm Bhonri Lal Hiralal and for rendition of accounts of the firm and for partition of the movable and immovable properties and for separate possession. The plaintiffs also moved an application for appointment of receiver under Order 40, Rule 1, C.P.C. On 30th March, 1976, one of the defendants Om Prakash appeared in the trial Court suo motu and requested that he should be heard before passing any order on the application under Order 40, Rule 1. The copy of the application and the plaint was given to the defendant Om Prakash and the summons of the suit and notices of the application for appointment of receiver were ordered to be issued for the other defendants. The case was fixed for 15th April, 1976 for hearing arguments on the application for appointment of receiver. I deem it necessary to reproduce the order-sheet dated 30th March,

1976 as most of the arguments have been advanced on the basis of the order passed on 30th March, 1976:--

^^dfe"uj dh fjikVZ ns[kh xbZ A odhy oknh Jh bnzayky feRry mifLFkr gS A odhy oknh ,MoyeZ dksVZ Qhl nk[khy djus dks lger gS ftlds fy;s volj pkgrs gS vr% vkxkeh rkjh[k rd ,MoyeZ dksVZ Qhl nkf[ky djsa A nkok ntZ jftLVj gks A izfroknhx.k ds uke lEeu tkjh gks A oknh usa nkos ds lkFk nj[kkLr tsj vkMZj 40 :y 1 tkCrk nhokuh is"k gqbZ gS A izfroknh vkseizdk"k gkftj vk;k mlus Jh t;ukjk;.k xqIrk odhy dk odkyrukek is"k fd;k o nj[kkLr is"k dh fd nj[okLr ij dksbZ Hkh vkKk nsus ls iwoZ mls lwuk tkos A udy nj[kkLr o udy nkok izfroknh ua- 6 vkseizdk"k dks nh xbZ A ckdh izfroknh ds uke lEeu nkok c uksVI nj[kkLr tkjh gksa A udy nkok o udy nj[kkLr lEeu o uksfVlst ds lkFk Hksth tkos A ryckuk izkFkhZoknh is"k djs ifUtdk rkjh[k 15&4&76 dks is"k gks A nj[kkLr dh cgl mlh fnu lquh tkosxh A**

3. On 15th April, 1976, Om Prakash and two other defendants Moti Lal and Lalta Prasad filed an application u/s 34 of the Arbitration Act for staying the proceedings of the suit. The learned trial Court by its order dated 1st May, 1978, rejected the application filed by the defendants u/s 34 of the Arbitration Act. The defendants aggrieved against the said order of the trial Court, have come in appeal to this court.

4. It is argued by the learned counsel for the appellants that the defendant Om Prakash cannot be said to have taken any other step in the proceedings as contemplated u/s 34 of the Arbitration Act, merely by appearing in the court on 30th March, 1976 in order that he might be heard before any ex parte order is passed on an application for the appointment of receiver. It is submitted that admittedly no written statement has been filed by the defendants and the defendant Om Prakash alone had appeared on 30th March, 1976 merely for the purpose of bringing it to the notice of the learned trial Court that no order may be passed on the application filed by the plaintiffs under Order 40, Rule 1, C.P.C. without hearing him. The defendants were not even aware of the nature and scope of the suit filed by the plaintiff as they had not been served upon with the copy of the plaint or application for appointment of receiver and as such it cannot be said by any stretch of imagination that the defendant had taken any other steps in the proceedings. It is further submitted that the defendants were entitled to the stay of the proceedings of the suit as the plaintiffs were bound to refer the dispute to arbitration in accordance with the arbitration agreement and that the applicants at the time when the proceedings were commenced and still remained, ready and willing to do all things necessary to the proper conduct of the arbitration. It has been further argued that by merely attending the court on 30th March 1976, as indicated above in the order-sheet dated 30th March, 1976, it cannot be inferred that the defendants had any intention to take part in suit or to waive the exercise of their right u/s 34 of the Arbitration Act. Reliance is placed on Sansarchand Deshraj Vs. State of M.P. and Others, , Dunichand Sons and Co. Vs. Fort Gloster Industries Ltd., , Anandkumar Parmanand Kejriwala and Another Vs. Kamaladevi Hiralal Kejriwal, , Union of India (UOI) Vs. Hind

Galvanizing and Engineering Co. Pvt. Ltd., , Queens College, Kanetra and Another Vs. The Collector, Varanasi and Others, , Sat Pal Anand and Others Vs. R.K. Ahuja and Others, , Biswanath Rungta Vs. Oriental Industrial Engineering Co. Pvt. Ltd. and Others, , Joharimal v. Fatehchand 1960 RLW 84 and The State of Uttar Pradesh and Another Vs. Janki Saran Kailash Chandra and Another, .

5. It is also submitted by the learned counsel for the appellants that there was no complicated question of law involved in the suit and even a question of law can be decided by the arbitrator and the learned trial Court was wrong in refusing to stay the proceedings of the suit on this ground. Reliance is placed on Firm Chimanram Mothilal v. Firm Van-dravandas Gordhandas AIR 1948 Bom 55 , and Chandanmull Jhaleria and Others Vs. Clive Mills Co. Ltd. and Others, .

6. Mr. Agrawal learned counsel for the plaintiff-respondents has argued that even the action of the defendant Om Prakash of contesting the application for the appointment of receiver will be considered as taking any other steps in the proceedings within the meaning of Section 34 of the Arbitration Act. According to the learned counsel even if the defendant Om Prakash had not filed any written statement, he had appeared having knowledge of the suit filed against him and he had received the copy of the plaint and application on 30th Mar. 1976 with an intention to file a written statement and his prayer for not passing any ex parte order on the application for appointment of receiver without hearing him should be considered a clear act of estoppel or submitting to the jurisdiction of the court for the purpose of adjudication of the merits of the controversy in the suit. He placed reliance on P. Gunnu Rao v. P. Thiagaraja Rao AIR 1949 Mad 58 Amritraj Kothari Vs. Golecha Financiers, , Amritraj Kothari Vs. Golecha Financiers, , Deluxe Film Distributors Ltd. Vs. Sukumar Kumar, , Union of India (UOI) Vs. Hans Raj Gupta and Co., , S. Ramalingam Chettiar Vs. S. Sarveswaran and Others, , Nandipati Rami Reddi and Others Vs. Nandipati Padma Reddy and Others, , and Kunta Malla Reddy Vs. Soma Srinivas Reddy and Others, .

7. It was further submitted that if the entire conduct of the defendants is taken into consideration it would be clear that they never intended to refer the matter to arbitration. A notice was given by the plaintiffs on 24th Apr. 1975 containing all the averments made in the plaint and the defendants Nos. 2 to 5 Hira Lal, Moti Lal, Hazari Lal and Nand Lal had sent a reply on 10th Nov. 1975 in which they never expressed a desire to refer the matter to arbitration. According to the learned counsel this conduct of the defendants shows that the defendants were not ready and willing to do all things necessary to the proper conduct of the arbitration and had thus forfeited their right u/s 34 of the Arbitration Act. It is further submitted that serious and complicated questions of law are to be tried in the suit which cannot be determined by the arbitrator and this court should not interfere in the discretion exercised by the trial Court. It is further submitted that in order to bring the cases u/s 34 of the Arbitration Act it is necessary for the defendants to prove that, the entire dispute raised in the suit must be covered under the arbitration clause. In order that an arbitration clause can be enforced

there must also exist a dispute. It is submitted that Bhon-rey Lal father of the plaintiff Prabhu Dayal was no doubt a partner in the firm M/s. Bhonri Lal Hira Lal in pursuance of a partnership deed dated 6th Nov. 1949. Bhonrila1 died on 15th Apr. 1966 and Smt. Gulab Devi w/o Bhonri Lal was included in the partnership on 18th Apr. 1966. On 11th Nov. 1969, Gulab Devi also ceased to be a partner in the firm and Om Pra-kash and Lalta Prasad defendants were included in the partnership in place of Smt. Gulab Devi. On 31st Oct. 1970 Lalta Prasad and Pukhraj also elected to go out of the partnership and only Om Prakash remained in the partnership. It is thus contended that when the defendants are not treating the plaintiffs to claim any share in firm M/s. Bhonri Lal Hira Lal as heirs of deceased Bhonri Lal, the defendants have no right to demand the enforcement of arbitration clause in the partnership agreement. Reliance is placed on The Union of India Vs. Kishorilal Gupta and Bros., , Union of India (UOI) Vs. Birla Cotton Spinning and Weaving Mills Ltd., and Dadri Cement Company and Another Vs. Bird and Co. (P) Ltd., .

8. In reply A the arguments of Mr. Agrawal, learned counsel for the defendant appellant has further argued that the plaintiffs are bound by their own averments in the plaint so far the defendants had not filed any written statement and it cannot be presumed as to what stand the defendants will take. The defendant petitioner Om Prakash is not bound by any reply given by the other defendants on 10th Nov. 1975. The arbitrator has power to grant all reliefs claimed by the plaintiffs in the suit including the dissolution of the partnership firm. Reliance is placed on Pannalal Paul and Others Vs. Sm. Padmabati Paul and Others, and Satyendra Nath Mitra Vs. Union of India (UOI), , in support of the contentions raised above.

9. I have given my careful consideration to the arguments raised by the learned counsel for both the parties. There is no doubt that there is a conflict of views in the various High Courts on the question whether a defendant will be barred or not merely by taking part in the interlocutory proceedings like the appointment of receiver or temporary injunction etc. However, much controversy is set at rest by the pronouncement of their Lordships of the Supreme Court in the State of U. P. (supra) in which it has been held that;

"In our view, there is no serious infirmity in the impugned judgment of the High Court and we are unable to find any cogent ground for interference under Article 136 of the Constitution. The legal position with respect to the scope and meaning of Section 34 of the Arbitration Act admits of little doubt, the language of this section being quite plain. When a party to an arbitration agreement commences any legal proceedings against any other party to the said agreement with respect to the subject matter thereof, then the other party is entitled to ask for such proceedings to be stayed so as to enable the arbitration agreement to be carried out. It is, however, to be clearly understood that the mere existence of an arbitration clause in an agreement does not by itself operate as a bar to a suit in the Court. It does not by itself impose any obligation on the Court to stay the

suit or to give any opportunity to the defendant to consider the question of enforcing the arbitration agreement. The right to institute a suit in some Court is conferred on a person having a grievance of a civil nature, under the general law. It is a fundamental principle of law that where there is a right is remedy.. Section 9 C.P.C. confers this general law of suit on aggrieved person except where the cognizance of the suit is barred either expressly or impliedly. A party seeking to curtail this general right of suit has to discharge the onus of establishing his right to do so and the law curtailing such general right has to be strictly complied with. To enable a defendant to obtain an order staying the suit, apart from other conditions mentioned in Section 34 of the Arbitration Act he is required to present his application praying for stay before filing his written statement or taking any other step in the suit proceedings. In the present case the written statement was indisputably not filed before the application for stay was presented. The question is whether any other step was taken in the proceeding as contemplated by Section 34 and it is the point with which we are directly concerned in the present case. Taking other steps in the suit proceedings connotes the idea of doing something in aid of the progress of the suit or submitting to the jurisdiction of the Court for the purpose of adjudication of the merits of the controversy in the suit."

In view of the above pronouncement we have to see whether the defendant Om Prakash by appearing on 30th Mar. 1976 for the purpose of being heard before any order to be passed on the application for the appointment of receiver can be said to have done something in aid of the progress of the suit or submitting to the jurisdiction of the court for the purposes of adjudication of the merits of the controversy in the suit. The defendant Om Prakash on 30th Mar. 1976, merely appeared through a counsel and submitted an application that he may be heard before passing any order on the application for the appointment of receiver. The copy of the plaint and the application was given to him on that date. The case was adjourned for 15th Apr. 1976 and the order-sheet dated 30th Mar. 1976 also does not mention that the defendant Om Prakash had agreed or was directed to file a written statement on the next date i.e. 15th Apr. 1976. On the next date i.e. 15th Apr. 1976, the defendant Om Prakash along with two other defendants filed an application u/s 34 of the Arbitration Act. No other act was done by the defendant Om Prakash on 30th Mar. 1976 which may lead to an inference that he wanted to do something in aid of the progress of the suit or had submitted to the jurisdiction of the court for the purpose of adjudication of the merits of the controversy in the suit. Their Lordships of the Supreme Court while considering the scope and meaning of Section 34 Arbitration Act in the case of State of U. P. (supra) referred to above have used the word "suit" while interpreting the words "taking any other step in the proceedings under S. 34 of the Arbitration Act." This clearly shows that the words "taking any other step in the proceedings" connote an idea of doing something in aid of the progress of the suit. If a defendant merely appears for the purpose of contesting any interlocutory application in order to protect his rights from any ex parte order being passed on

such application and requests the court for giving a hearing before passing an ex parte order, he cannot be said to have submitted to the jurisdiction of the Court for the purpose of adjudication of the merits of the controversy in the suit within the meaning of Section 34 of the Arbitration Act. This sort of act simpliciter with no other conduct of the defendant to take part in the proceedings in the suit cannot be considered as an act of waiver or having lost a right to claim stay of the suit u/s 34 of the Arbitration Act. Thus as regards this question I am in agreement with the arguments advanced by the learned counsel for the appellants.

10. The plaintiffs have come forward with the allegations in the plaint that Shri Ram Narain a common ancestor of the parties had started a business in the name of Bhonri Lal Hiralal. Ram Narain was living jointly with his five sons. After the death of Ram Narain, the entire movable and immovable properties left by Ram Narain and the business of M/s. Bhonri Lal Hiralal came to the share of his sons as members of the joint Hindu family. Thereafter the joint family business in the name of Bhonri Lal Hira Lal was changed in the form of a partnership firm registered under the Partnership Act in order to gain some advantage under the Income Tax law. A partnership deed was executed between Bhonri Lal father of the plaintiff Prabhu Dayal and defendants Hira Lal, Moti Lal, Hazari Lal and Nand Lal sons of Ram Narain. The registered partnership of Messrs. Bhonri Lal Hira Lal remained the property of the joint Hindu family of the parties. Bhonri Lal father of the plaintiff Prabhu Dayal was given 1/5th share as representing his branch in the joint Hindu family. After the death of Bhonri Lal on 15th Apr. 1966. Gulab Devi w/o Bhonri Lal was included in the partnership of Messrs. Bhonri Lal Hira Lal representing the branch of the plaintiffs. Smt. Gulab Devi being an uneducated lady and old aged, was turned out of the partnership in collusion of the defendants Nos. 2 to 5 who were the sons of Ram Narain. However, Shri Om Prakash and Lalta Prasad other brothers of plaintiff Prabhu Dayal were included in the partnership of the firm Bhonri Lal Hira Lal and after sometime Lalta Prasad was also turned out of the partnership. The plaintiffs asked the defendant to render the accounts and give the share in the partnership firm and also gave a registered notice but the defendants Nos. 2 to 5 gave a reply that the plaintiffs never remained partners in the firm Messrs. Bhonri Lal Hira Lal and that the plaintiffs were doing their separate business in the firm name of Prabhu Dayal Om Prakash. They never agreed to refer the matter to arbitration. In reply to the application filed by the plaintiffs for the appointment of receiver, the defendants took the stand that Prabhu Dayal plaintiff had separated from his father by taking Rs. 55,000/- and after the death of his father Bhonri Lal, Prabhu Dayal plaintiff took a further sum of Rs. 25,000/- from the other heirs of Bhonri Lal and executed a relinquish-ment deed on 22nd Dec. 1968 whereby he agreed to relinquish all his rights and share in the firm M/s. Bhonri Lal Hira Lal and in all movable and immovable properties left by Bhonri Lal. In view of this stand taken by the defendants Om Prakash, Lalta Prasad, Moti Lal, and Smt. Gulab Devi in the reply to the application for the appointment of receiver, it is clear that the

defendants are not accepting the plaintiffs to have any share in the firm Bhonri Lal Hira Lal and are also relying on a relinquishment deed executed by the plaintiff, Prabhu Dayal on 22nd Dec. 1968. The defendants in view of the above stand taken by them cannot be permitted to rely on Para No. 15 of the arbitration clause in the partnership deed dated 6th Nov. 1949, which reads as under:

^^;g fd QeZ ds lk>hknj ?ikVZulZ? esa vFkok izfrfuf/k;ksa ;k okfjku esa bl "kjkdr ukesa dh "jk;rksa ds lECU/k esa ;k fglkokr lECU/kh uQ uqdlku dk >xM+k iSnk gksus ij lc lkFkhknjku dh jtkeUnh ls fuokZfpr lkyh ?Arbitrator? nqckjk ml le; ds izpfyr ?Arbitration Act? ds rgr r; fd;k tkosxk A**

11. u/s 34 of the Arbitration Act the following conditions must co-exist;--

(i) there must be a subsisting and binding arbitration agreement capable of being enforced between the parties;

(ii) the subject matter in dispute in the proceedings sought to be stayed must be within the scope of the arbitration agreement; and

(iii) the petition must be made to the judicial authority by a party to the arbitration agreement or some person claiming under him at the earliest stage of the proceedings, i.e. before the filing of the written statement or taking any other step in the proceedings.

The Judicial Authority may, if these conditions exist, grant stay, if it is satisfied that the party applying is and has also been at all material times before the proceedings were commenced ready and willing to do all things necessary for the proper conduct of the arbitration and there is no sufficient reason for not referring the matter in accordance with the Arbitration Act. In *Union of India v. Birla Cotton Spinning and Weaving Mills Ltd.* (supra), it was held by their Lordships of the Supreme Court that;

"The evidence recorded by the Trial Court discloses that there was no dispute between the Company and the Union arising under the contract on which the suit was filed. The Union accepted liability to pay the amount claimed by the Company in the suit. The Union still declined to pay the amount asserting that an amount was due from the Company to the Union under a distinct contract. This amount was not sought to be set-off under any term of the contract under which the Company made the claim. The dispute raised by the Union was, therefore, not in respect of the liability under the terms of the contract which included the arbitration clause, but in respect of an alleged liability of the Company under another contract which it may be noted had already been referred to arbitration. The Union had no defence to the action filed by the Company: it was not contended that the amount of Rs. 10,625 was not due to the Company under the contract relied upon by the Company. For enforcement of the arbitration clause there must exist a dispute: in the absence of a dispute between the parties to the arbitration agreement, there can be no reference."

Thus for enforcement of the arbitration clause there must exist a dispute; in the absence of a dispute between the parties to the arbitration agreement, there can be no reference. As already mentioned above the stand taken by the defendants cannot be considered as an existence of a dispute between the parties to the arbitration agreement. In reply to the notice sent by the plaintiffs some of the defendants at least had denied the share of the plaintiffs in the partnership firm M/s. Bhonri Lal Hira Lal. It is no doubt true that the defendants have not filed any written statement so far, but their stand is clear from the reply to the notice given by them and by the stand taken in reply to the application for the appointment of receiver. The arguments of the learned counsel for the defendant appellants that the appellants Om Pra-kash and Lalta Prasad were not bound by any reply to the notice sent by other defendants namely Hira Lal, Moti Lal Hazari Lal and Nand Lal sons of Ram Narain, has no legs to stand inasmuch as they have joined with these defendants in filing the appeal before this court and have engaged a common lawyer. There is nothing on record so far to show that the defendants appellants Om Prakash and Lalta Prasad have a conflict of interest with the other defendants in so far as contesting the claim of the plaintiffs. Learned counsel for the defendant appellants during the course of argument was also not prepared to say on behalf of the defendant-appellants Om Prakash and Lalta Prasad that they agreed to the plaintiff's share in the partnership firm Bhonri Lal Hira Lal. That apart, after the controversy raised by some of the defendants goes beyond the scope of an arbitration clause, in my humble opinion the other defendants, who might bring the case under the arbitration clause, cannot be permitted to get the proceedings stayed u/s 34 of the Arbitration Act. Thus looking the case from any point of view I am fully convinced that the defendants are not entitled to get the proceedings stayed u/s 34 of the Arbitration Act.

12. In the result this appeal fails and is dismissed with costs.