

(2001) 02 KAR CK 0081
In the Karnataka High Court
Case No : Writ Petition No. 2736 of 2001

K. Srinivasulu Reddy and Others

APPELLANT

Vs

D.K. Audikesavulu and Others

RESPONDENT

Date of Decision : 15-02-2001

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2001) 3 KCCR 1568

Hon'ble Judges : Hari Nath Tilhari, J

Bench : Single Bench

Advocate : K.N. Subba Reddy, for the Appellant; H. Kumaraswamy Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Hari Nath Tilhari, J.—This writ petition is filed under Article 226 of the Constitution of India challenging the order passed by the Hon"ble Mr. Justice R.V. Raveendran in Civil Miscellaneous Petition No. 27 of 2000 in his capacity as the Judge, i.e., a person designated by the Hon"ble Chief Justice to exercise power u/s 11 in the matter of appointment of Arbitrators under Arbitration and Conciliation Act 1996 ("the Act" for short).

2. The present Respondents moved an application u/s 11 of the Act for appointment of an Arbitrator in terms of Clause 13 of the partnership deed. The prayer that was made in the application u/s 11 of the Act was to appoint Hon"ble Justice K.A. Swami or any other retired High Court judge as a sole Arbitrator to adjudicate the dispute referred to in notice dated 24.1.2000 placed as Annexure "Q" to the writ petition. Nodoubt, Brother R.V. Raveendran, J., was pleased to issue notice and the present Petitioners who were Respondents in Civil Miscellaneous Petition No. 27 of 2000 appeared and did not dispute the existence of Arbitration agreement among the parties as per Clause 13 of the partnership deed dated 6.12.1992, but raised the contention that dispute was not arbitrable and therefore prayed for dismissal of the application which had been moved by

the present Respondents for appointment of an Arbitrator. Brother R.V. Raveendran, J., by order dated 23.10.2000 allowed the present Respondents' application and in exercise of power u/s 11(6) and appointed Justice S. Venkataraman, retired Judge of this Court, residing at No. 161, II Block, III Stage, West of Chord Road, Judges Colony, Basaveswaranagar, Bangalore-560 079, to be the sole Arbitrator to decide the matter.

3. In paragraph 11 of the order, it has been observed as under:

The petition is allowed. The disputes between the parties relating to the partnership of Srinivasa Builders, as detailed in the notices dated 4.1.2000 and 24.1.2000, said to arise out of the notice dated 27.1.1999, issued by the first Respondent are referred to Arbitration under the Act. All questions and contentions of the parties including those relating to arbitrability are left open to be urged before the Arbitrator.

Feeling aggrieved from this order, the Petitioners have come up before this Court by petition under Article 226 of the Constitution of India.

4. To the query made by this Court as to how the petition is maintainable under Article 226 of the Constitution of India, the learned Counsel for the Petitioners Sri K.N. Subba Reddy assisted by Sri Ram Mohan Reddy, contended that the order impugned is of the nature of an administrative order passed by the Hon'ble Chief Justice in his capacity as Chief Justice or his nominee as the nominee and not as a Court or as the High Court and an order passed on the administrative side by the Hon'ble Chief Justice can be challenged under Article 226 of the Constitution of India. In this connection, the learned Counsel for the Petitioners made reference to the decision of the Hon'ble Supreme Court in the case of M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., as well as to later decisions in the case of Ador Samia Private Limited Vs. Peekay Holdings Limited and Others, and Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co., and contended that as against the order passed by this Court on the administrative side can be challenged by filing a writ petition and a writ of mandamus etc. could be issued in the circumstances of the case. Basing this case the learned Counsel contended that under Article 226 of the Constitution of India, the petition is maintainable.

5. The question arises is whether a writ of certiorari can be issued against an administrative order. It is a well settled principle of law that writ of certiorari can be issued to quash the orders which are judicial in nature or quasi judicial in nature but not with respect to administrative order. Nodoubt, in the case of Konkan Railway Corporation Limited and Ors. v. Mehul Construction Company, the Hon'ble Supreme Court laid down that writ of mandamus could be issued in a case where the Chief Justice or the nominee Judge has refused to appoint the Arbitrator and in that case, it may be a case of refusal to perform his duties and obligations imposed on him to appoint the Arbitrator and therefore writ of mandamus could be prayed for. The present is not a case of that nature. Here

the Hon"ble Mr. Justice R.V. Raveendran has not passed an order refusing to appoint the Arbitrator. He has performed the duties required by the Chief Justice to appoint an Arbitrator. The order impugned is not of refusal and therefore there is no question of any writ of mandamus being issued.

6. In the case of Sundaram Finance Limited v. NEPC India Limited, Hon"ble Supreme Court laid down and observed "Under 1996 Act appointment of arbitrator/s is made as per the provision of Section 11 which does not require the Court to pass a judicial order appointing the arbitrator/s". The High Court therefore, was wrong in referring to provisions of Arbitration Act, 1940 while interpreting Section 9 of the new Act. This decision was followed by the Hon"ble Supreme Court in later decisions as mentioned earlier, viz., Ador Samia Private Limited Vs. Peekay Holdings Limited and Others, . In this case it has been laid down as under:

As the learned Chief Justice or his designate u/s 11(6) of the Act acts in administrative capacity as held by this Court in the aforesaid decision it is obvious that this order is not passed by any Court exercising any judicial function nor it is a Tribunal having trappings of a judicial authority.

7. This view had been nodoubt, again followed with approval in case of Konkan Railway Corporation Limited and Ors. v. Mehul Construction Company. In this case the principle laid down is that when application is made in such a case, the Court is not required to hold any further enquiry as observed and if other conditions of the section appears to be fulfilled according to the opinion of the Court, it is only to pass an order of appointment, whether dispute is arbitrable or not or the like and the question may be decided by the Arbitrator before whom if and when it is raised. There was no dispute that there is a partnership agreement and Clause 6 was there. Once the Arbitrator is appointed, the questions had to be decided by the Arbitrator. The Hon"ble Chief Justice or his nominee Judge is only required to make appointment of the Arbitrator if under Sub-section (4) of Section 11, a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party or where two appointed arbitrators fail to agree on the third arbitrator upon request of a party or if the party themselves fail to agree on the arbitrator within thirty days from the date of receipt of request made by any of the parties to agree on appointment or under Sub-section (6) where, a procedure is agreed but the parties fail to act as required under that procedure; or the parties, or the two appointed arbitrators, fail to reach an agreement expected of them; or a person including an institution, fails to perform any function entrusted to him or it under that procedure, then in such circumstances, if request is made, the Chief Justice or the person or the institution nominated by him to take necessary steps for appointment of arbitrator, can and is empowered and is required to pass an order appointing the Arbitrator. Sub-section (7) nodoubt, declares that the order passed u/s 4 or Sub-section (5) or Sub-section (6) shall be final. It is final only with respect to appointment of Arbitrators. The plea so far as it concerned

whether the issue is arbitrable or not or the like, that can be raised before the Arbitrator and it is open to the Arbitrator to consider and the observations contained in the order of Hon''ble Mr. Justice R.V. Raveendran, are also to the same effect, that even if the order be treated in view of law laid down by the Hon''ble Supreme Court in administrative order. The present order has been passed in performance of duty imposed or obligations imposed u/s 11 of Arbitration and Conciliation Act, 1996.

8. Therefore, there is no question of writ of mandamus being issued as it is always open to the Petitioners to raise all the contentions including arbitrability of the dispute, I do not think that it is a fit case for exercise of power under Article 226 of the Constitution of India.

9. Writ Petition is hereby dismissed with the above observations. Parties to the case to bear their own costs.