

(1994) 09 KAR CK 0025

In the Karnataka High Court

Case No : Civil Revision Petns. No's. 4937 of 1990 and 1627 of 1992

M. Subramanya Shastri and etc.

APPELLANT

Vs

Dr. Chandrasekhara Shastri and others

RESPONDENT

Date of Decision : 07-09-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151, 24

Citation : AIR 1995 Kar 115 : (1994) ILR (Kar) 3002 : (1994) 5 KarLJ 196

Hon'ble Judges : R. Ramakrishna, J

Bench : Single Bench

Advocate : K.R.D. Karanth and V. Tarakaran, for the Appellant; Rajeeva Hegde, B. and Smt. Hemalatha Mahishi, for the Respondent

Judgement

1. In C.R.P. No. 4937 of 1990 the petitioner is the plaintiff in O.S. No. 440 of 1986 and first respondent in Arbitration Case. The respondents 1 to 19 are the defendants in the suit and parties to the arbitration proceedings.

2. The petitioners and the respondents in C.R.P. No. 1627 of 1992 are more or less the same parties in O.S. No. 440 of 1986. This Revision Petition is against the order passed by the learned District Judge, Mangalore (DK) in Misc. Petition No. 33 of 1990. The said Miscellaneous Petition was filed u/s 24 of the CPC (hereinafter referred to as the "Code") to withdraw the suit in O.S. No. 615 of 1989 which was filed for dissolution and accounting for profits and assets of the partnership firm called M/s. M. V. Shastri and Sons and to transfer it to the file of the 11 Additional Civil Judge, Mangalore for trial along with O.S. No. 440 of 1986 which suit is the subject matter in C.R.P. No. 4937 of 1990. The learned District Judge in his detailed order, having found there is no merits, has refused to entertain the application for transfer of the suit O.S. No. 615 of 1989.

3. Originally, the suit for dissolution was filed in O.S. 107 of 1986 and subsequently due to the amendments issued to the Civil Courts Act the suit was transferred to the Munsiffs Court and registered as O.S. No. 615 of 1989. Therefore, a decision in C.R.P. No. 4937 of 1990 will have a bearing in deciding

the question regarding the transfer of the suit.

4. O.S. No. 440 of 1986 has been filed by the petitioner herein for partition and possession of his 15/112th share in the properties owned by his father M. V. Shastri. After service of notice, the parties to the suit have filed a joint application under reference of the disputes to the arbitration of the three Advocates viz., Sri P. Janardhana Rao, Sri P. Madhava Rao and Sri L. D. Ballal Advocates of Mangalore. The Advocates so appointed were appearing for the various parties in the suit. They are directed to adjudicate the dispute and make an award within six months from the date of the reference providing opportunity for the parties to file their statements and to place necessary evidence. During the pendency one of the Arbitrators Sri P. Janardhana Rao died. With the consent of all the parties Sri K. Keshava Bhat, an Advocate was appointed as third Arbitrator in place of Sri P. Janardhana Rao. Sri K. Keshava Bhat was not appearing for any of the parties connected to this arbitration in the suit. As against the time fixed by the Court the arbitration proceedings took nearly three years. After the evidence, oral and documentary, case was closed and reserved for judgment by the Arbitrators and several meetings were held between the Arbitrators to deliver a judgment. At this stage, it was found that there was no unanimity of opinion as two Arbitrators viz., Sri P. Madhava Rao and Sri K. Keshava Bhatt taking one view and another Arbitrator Sri L. D. Ballal dissenting from the said view.

5. Sri L. D. Ballal filed I.A. No. 13 representing defendants 2 to 6, 11 and 15 u/s 151 of the Code with a prayer that the applicants may be permitted to withdraw the consent given for reference of the suit dispute to the Arbitrators and further they may be permitted to proceed with their defence in the Court itself. In the affidavit sworn to by one of the applicant in support of this application it was made clear that due to differences of opinion between the Arbitrators in arriving at a decision to pass an award and one of the Arbitrators also retired they were not willing to continue and they have decided to withdraw the consent.

6. The other parties to the Arbitration have resisted this application that the applicants have not made out any grounds to withdraw the consent and therefore, the application is liable to be rejected, and the other Arbitrators are competent to pass an award.

7. The learned Civil Judge has allowed the application on the ground that the petitioners have expressed their unwillingness to continue to participate in the arbitration and one of the Arbitrator has come out from the arbitration proceedings that it is not worthwhile to direct the other arbitrators to file the majority award and therefore, I.A. No. 13 is deserved to be accepted.

8. On this undisputed fact and circumstances, the question that would arise for consideration is :

Whether a Court would have jurisdiction to prevent submission of award by the majority of Arbitrators after the proceedings are concluded only on the ground

that some of the parties to the arbitration expresses their willingness to withdraw from arbitration and such application is filed by one of the Arbitrator who expressed his dissent to the majority view of the other Arbitrators?

9. Sri K.R.D. Karanth, the learned Advocate submitted that the parties have submitted themselves to the jurisdiction of the arbitration proceedings and the Arbitrators have recorded the evidence of the parties which came to more than 100 pages of depositions and 285 exhibits are marked and therefore Sri P. Madhaba Rao and Sri K. Keshava Bhat have filed a Memo dated 20-1-1990 setting out the events that took place on 30-12-1989 to give a direction to them to file the award as they have reached a consensus. Before the learned Civil Judge could pass orders on the Memo, applicants have filed I.A. No. 13 for withdrawal of consent and for revocation of reference to the Arbitrators by Sri L.D. Ballal who was himself an Arbitrator and therefore Sri L. D. Ballal in an attempt to scuttle the arbitration proceedings is instrumental to frustrate the time and labour spent by the other two Arbitrators and therefore, the learned trial Judge was not correct in accepting the application. The learned Advocate also submitted that revocation of reference should be exercised only in exceptional circumstances and it should not be granted merely on the ground that the decision of the Arbitrators may be adverse to one or the other of the parties.

10. Per contra Sri Rajeev Hegde, and Smt. Hemalatha Mahishi, the learned Advocates for the contesting respondents, have supported the order of the trial Court.

11. By virtue of the reference made by the Court for arbitration the parties have submitted themselves to the jurisdiction of the Arbitrators and consequent to such submission, the proceedings were concluded in accordance with law and some meetings were held between the Arbitrators to discuss about the judgment and in one such meeting it is found that one of the Arbitrator Sri L. D. Ballal is dissenting from the view taken by the other two Arbitrators. Therefore, a Memo was filed by the majority of Arbitrators on 20-1-1990 by setting out the proceedings that was held on 30-12-1989 to the following effect :--

"After discussions between the arbitrators in the light of the pleadings, the exhibits and the documentary evidence, the arbitrators have not been able to reach unanimous decision. Instead of proceeding to a majority award and a minority award, the arbitrator Sri L. D. Ballal prefers to retire from the arbitration. Hence the other two arbitrators who have reached a consensus are also not able to make the award."

This Memo indicates that the majority of the Arbitrators have required a direction of the Court either to submit the majority award or to restrain from making any award. But the learned Judge without considering this Memo has proceeded to decide I.A. No. 13 which was filed subsequent to this Memo. The learned Judge appears to have persuaded to the effect that one of the Arbitrator is willing to

retire from participating in passing of award. Sections 21 to 25 of Chapter IV of Arbitration Act, 1940 (hereinafter referred to as the "Act") provides for appointment of Arbitrators at the instance of the parties. u/s 25 of the Act the provisions of the other Chapters shall, so far as they can be made applicable, apply to arbitrations under this Chapter. Section 10 of the Act provides provisions as to appointment of three or more arbitrators. Under sub-clause (2) of Section 10 of the Act where an arbitration agreement provides that a reference shall be to three arbitrators to be appointed otherwise than as mentioned in sub-section (1) the award of the majority shall, unless the arbitration agreement otherwise provides, prevail. u/s 15 of the Act, the Court is envisaged with the power to modify or correct an award if the award offended the principles laid down under sub-clauses (a) to (c) of Section 15. The Court has also power to permit the award for reconsideration in the circumstances mentioned, in sub-clauses (a) to (c) of Section 16(1) of the Act. u/s 5 the authority of an appointed arbitrator or umpire shall not be revocable except with the leave of the Court, unless a contrary intention is expressed in the arbitration agreement. If the reference was made by the Court either u/s 20(4) or Section 23 of the Act, the Arbitrators should file the award in Court. If the Arbitrator do not file any award in Court, the parties have right to move the Court requiring the Arbitrators to file the award in Court. Therefore, the revocation u/s 5 requires good ground and compelling reasons. It is to be noted that after recording the deposition of several witnesses extending to more than 100 pages which was spread over for a period of 3 years and also marking documents as many as 245, merely because one of the Arbitrator, who is also an Advocate representing the parties in LA. No. 13 files an application is not a good ground for the trial Court to permit withdrawal of the consent by the parties who have learnt some adverse finding against them by one of the Arbitrators the order is legally unsustainable. The term employed in Section 5 shoulders a great responsibility to the Court before revocation of arbitration.

12. The Court had invested with the power to interfere with the award under the power invested in the Act. The finding of the learned Judge is contrary to the spirit of the arbitration whether the parties choose to submit themselves to the Arbitrators to shorten the proceedings and to get an award expeditiously. Therefore, the order of the learned trial Judge is legally unsustainable.

13. The learned Judge, in more than one place, has expressed his impression that due to retirement of one of the Arbitrator, the applicants who engaged the same Arbitrator, the consent should be accorded for withdrawal. The trial Court failed to note that the learned Arbitrator who expressed his desire to retire is an Advocate who was representing the applicants of the trial Court has failed to note this aspect of the matter which resulted in frustrating the efforts made by the Arbitrators. It is not difficult to reach a conclusion that I.A. No. 13 Was filed at the instance of the Arbitrator himself and therefore, the application lacked bona fides.

14. In *Amarchand Lalitkumar Vs. Shree Ambica Jute Mills Ltd.*, Sections 5 and 34 of the Act came up for consideration of the Hon"ble Judges of the Supreme Court. It is emphasised that without deciding the revocation of arbitration authorities the Court should be satisfied that substantial miscarriage of justice will take place. Their Lordships have held at para 13 thus:--

"We have now turned to the legal position which seems to us to be quite clear. Before the Court exercises its discretion to give leave to revoke an arbitrator's authority, it should be satisfied that a substantial miscarriage of justice will take place in the event of its refusal. In considering the exercise by the Court of the power of revocation it must not be forgotten that arbitration is a particular method for the settlement of disputes. Parties not willing "the laws delays" know, or ought to know, that in referring a dispute to arbitration they take arbitration for better or worse, and that his decision is final both as to fact and law. In many cases the parties prefer arbitration for these reasons. In exercising its discretion cautiously and sparingly, the Court has no doubt these circumstances in view, and considers that the parties should not be relieved from a tribunal they have chosen because they fear that the arbitrator's decision may go against them. (See Russell on Arbitration 16th edition, page 54).

The grounds on which leave to revoke may be given have been put under five heads :

1. Excess of refusal of jurisdiction by arbitrator.
2. Misconduct of arbitrator.
3. Disqualification of arbitrator.
4. Charges of fraud.
5. Exceptional cases."

15. Therefore, it is necessary that a party cannot resile from a reference to arbitration at his sweet will and pleasure, and it cannot avail him to show that having once agreed to reference he afterwards repented of his action. Where parties submit their difference to arbitration, they cannot be allowed to revoke or withdraw from the submission except for very good reason.

16. In *Y.L. Paul Vs. G.C. Joseph and Another*, it is held that signing of the majority of the Arbitrators held to be a valid award.

17. In *AIR 1925 712 (Oudh)* the award made by the majority was held to be a valid one. In that case, the matter in dispute in a pending suit was referred to the arbitration of two arbitrators and an umpire and the term of the reference provided for a decision according to the opinion of the majority in the event of their being any dissent, and after the proceedings were over, the dissenting arbitrator left the place after expressing his dissent from the opinion of the majority of the award was reduced to writing. The award was held to be in accordance with the terms of the reference and was perfectly valid.

18. Having regard to these facts and circumstances, the learned Civil Judge has committed an error in accepting I.A. No. 13 which indirectly frustrated the efforts of the majority of the parties in getting an arbitration award.

19. In the result, C.R.P. No. 4937 of 1990 is allowed. The impugned order on I.A. No 13 dated 4-6-5990 is hereby set aside. The learned Civil Judge is directed to make a reference to the Arbitrators Sri P. Madhava Rao and Sri K. Keshava Bhat to make the award and submit the same to the Court within a reasonable time. After submission of the award, the Court may proceed with the matter in accordance with law.

Consequent to the allowing of C.R.P. No. 4937 of 1990, the impugned order of the learned District Judge in Misc. No. 33 of 1990 is liable to be interfered with.

Therefore, in the result, C.R.P. No. 1627 of 1992 is also allowed. O.S. No. 615 of 1989 is ordered to be withdrawn from the file of the Munsiff and made over to the learned Civil Judge before whom O.S. No. 440 of 1986 is pending.

The learned Civil Judge is directed to decide both the cases in accordance with law.

In the circumstances of the case, the parties are directed to bear their own costs.

20. Order accordingly.