

(1958) 08 KL CK 0005
In the High Court Of Kerala
Case No : C.M.A. 25 of 1956

Meenakshi Amma and Others

APPELLANT

Vs

Ammu Amma and Others

RESPONDENT

Date of Decision : 11-08-1958

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : (1958) KLJ 1182

Hon'ble Judges : N. Varadaraja Iyengar, J;K. Sankaran, J

Bench : Division Bench

Advocate : C. Achutha Menon and M. Thankom, for the Appellant; K. Mohammed Naha and P. Mohammed for Respondent No. 1 and 3, for the Respondent

Judgement

N.V. Iyengar, J.—This appeal is by the plaintiffs 1 to 3 in a suit for partition and is directed against an Interlocutory Order in the case, rejecting their application for appointment of a Receiver in respect of the plaint schedule properties. The appellants 1 to 3 and the respondents 1 to 12 are members of a Nair tarwad in Calicut taluq. They had all joined in 1944 to refer to single arbitrator, the division per capita of their tarwad properties scheduled as A and B to the suit and also of the C Schedule Putravakasam properties as among the parties entitled. On account of the alleged dilatory tactics of the opposite parties in 1947, the plaintiffs approached the court for cancellation of the reference. Ultimately in 1950 the matter was compromised between all the parties, so as to allow the arbitrator to function and bring out his award as early as possible. Vide Ext. B2 petition. On 22-5-1954, however, the respondents 1 and 3 who were the seniormost female and male members in the tarwad and were therefore under the family karar, in possession of the properties, wrote to the arbitrator refusing further co-operation. It was on this account that the plaintiffs soon after, filed this suit, and the application for receiver along with it. In the suit, the plaintiffs claimed partition by metes and bounds of their 3/16 share in A and B schedule properties and of 1/6 share in the C Schedule properties. In the Receiver

application they prayed that all the A and C schedule properties be entrusted to Receiver for purpose of their protection and conservation. The suit and the application were resisted chiefly by the respondents 1 and 3. Some of the defendants supported the plaintiffs and some others, the respondents 1 and 3.

2. The court below in disposing of the petition against the plaintiffs relied mainly on two considerations. Firstly, that the respondents 1 and 3 were entitled to be in undisturbed possession in their capacity as managers under the family karar, until at any rate partition was effected under the decree in the case, and secondly that the arbitration proceedings so far not put an end to formally, must be a bar to the suit itself. The court also found incidentally that the profits of the properties of which the plaintiffs were kept out, if measured by the estimate in the plaint, was rather low and could easily come out of the respondent's shares in the corpus. Further that the suits already filed and pending, for recovery of arrears of jenmi dues, did not mean any imminent sale of any tarwad properties and therefore did not matter. Learned Counsel for the appellants says that this reasoning is totally unsubstantial and it is only just and convenient in all the circumstances that Receiver should be appointed as prayed for. We think there is a good deal of force in this argument.

3. As regards the right of the respondents 1 and 3 to exclusive possession until partition, it may no doubt be true that the family karar so authorised them. But with the onset of the arbitration agreement providing for division per capita, the position must be deemed to have changed entirely. The parties attained thereby a division of status among themselves and the possession of the erstwhile managers resting on status became one depending on express or implied agreement for the future. Indeed the new situation became more emphasised by virtue of the suit for partition herein. Defining the status of the erstwhile Karta in a joint Hindu trading family after suit for partition was filed, Varadachariar, J. in *Muthyala Ramachandrappa Vs. Muthyala Narayanappa and Others*, observed:

As long as the family remained joint the managing member enjoyed under the law, and not by any contract or arrangement, certain powers in respect of the carrying on of the family business; but on the disruption of the joint status, these powers so far as they rested only on his status as managing member must be held to come to an end. It is true that it may be sometime before the properties are actually divided between the members but in the meanwhile it is the duty of the person in possession or management merely to preserve the estate and not to enter into new transactions unless he is prepared to do so on his own responsibility or the new transactions are necessary merely to fulfil obligations already contracted or to prevent loss to the estate. From the mere fact that even after disruption the old manager continues to do business even if it be the same kind or business as before, it cannot be held that it is family business or even that he is doing it or intends to do it on behalf of the other members of the family. The omission of the other members to object to his doing business will not of itself amount to an authorisation or even to a consent to the carrying on of

the business on their behalf.

It follows therefore that the court below was not correct in assuming a favoured position for the respondents, non-traders even as they were, on the basis merely of the family karar. The ground of stay of suit on account of pending arbitration, relied on by the lower court is equally unsubstantial and that for the simple reason that it was not raised by the respondents 1 and 3 "before filing a written statement or taking any other steps" in the suit as provided for u/s 34 of the Arbitration Act 1940. It is well settled that the existence of the submission or the pendency of arbitration proceedings is no defence to an action in breach thereof unless the stay is obtained in accordance with the provisions of this Section. As observed in the leading case on the subject *Doeman & Sons v. Onsett Corporation* (1912) 3 K.B. 257 Fletcher Moulton, L.J.:

The present position, therefore, of agreements to refer to private tribunals may be shortly expressed thus. The law will not enforce the specific performance of such agreements but if duly appealed to it has power, in its discretion, to refuse to a party the alternative of having the dispute settled by a court of law, and thus to leave him in the position of having no other remedy than to proceed by arbitration. If the court has refused to stay an action, or if the defendant has abstained from asking to do so, the court has seisin of the disputes and it is by its decision, and by its decision alone, that the rights of the parties are settled. It follows, therefore, that in the latter cases the private tribunal, if it has ever come into existence, is *functus officio*, unless the parties agree *de novo* that the dispute shall be tried by arbitration, as in the case where they agree that the action, itself be referred

The respondents 1 and 3 have no doubt attempted to make good their failure in this connection by special motion at later stage. But this certainly cannot affect the question. It is not clear why the court below failed to notice this obvious aspect.

4. The other grounds relied on by the court below though incidentally, have also no merit. As pointed out by Learned Counsel for the plaintiffs, the estimate of Rs. 500/- as regards the plaintiffs' profits made in the plaint, was only an approximation for purpose of court fees for the relief by way of accounting. In any event there is no warrant for the defendants 1 and 3 to claim a right to appropriate the plaintiffs' profits for themselves during the interval of the suit, on the pleas merely that there is sufficient security ultimately to look to. Nor is it open to them to so appropriate as to cause default in payment of jenmi dues and litigation in the result and say that the properties are not in danger of immediate sale thereunder. We do not think however that a Receiver appointment is straightaway called for. It would be enough, in our opinion, if the plaintiffs' interest and the properties in the suit are safe-guarded. We therefore reverse the order of the court below and remit the matter back for disposal as follows:

The court below will estimate the probable share of the income due to the

plaintiffs in the scheduled properties and direct the defendants 1 and 3 to deposit the same for payment to the plaintiffs periodically for the future. The court below will also take appropriate measures to see that the defendants 1 and 3 pay off the common liabilities in the shape of jenmi dues and otherwise already accrued due and which may fall due for the future. It will be open to the court below to take all necessary measures to implement these directions. The appellants will get their costs of this Court from the contesting respondents 1 and 3.