(1994) 07 KAR CK 0003

In the Karnataka High Court

Case No : C.R.P. No. 3326 of 1993

Nagareswara Setty APPELLANT

Vs

Prabhakar Setty RESPONDENT

Date of Decision : 27-07-1994

Acts Referred:
Arbitration Act, 1940 — Section 20, 41, 8

Citation : (1994) ILR (Kar) 2826 : (1994) 4 KarLJ 476

Hon'ble Judges : Sadashiva, J

Bench : Single Bench

Advocate : D.L.N. Rao, for the Appellant; G.V. Shantharaju and Nanjunda Reddy for Kesvy and Co., for the Respondent

Final Decision : Dismissed

Judgement

Sadashiva, J

1. This Revision Petition is directed against the order dated 14-11-1993 passed by the learned Civil Judge, Hospet, on I.A.No. III in A.C.No. 2/92 directing the petitioner to pay or deposit a sum of Rs. 2,88,495/- on the ground that the same is admittedly payable to the respondent

2. The respondent filed an application in the Court of the learned Civil Judge, Hospet, under Sections 8 and 20 of the Arbitration Act, 1940 (for short ''the Act'') for filing arbitration agreement, to appoint an Arbitrator and to make a Reference on points of disputes to the Arbitrator so appointed for making an Award. The points of dispute on which the Reference has been sought are as follows :

1. Whether the petitioner does not continue to be the partner despite expulsion ?

2. Whether the partners are entitled to expel the partner under law ?

3. Whether the opponents are not liable to account from such date of alleged expulsion and continue to pay the petitioner his share of profits, etc.?

3. The respondent has filed the aforesaid application for reliefs aforesaid, as the petitioners have unilaterally expelled him from the partnership M/s P. Balasubba Setty & Son without his knowledge and consent and such expulsion is impermissible in law in respect of joint family partnership. He has made several allegations against the petitioners, which are not relevant for the purpose of this Revision.

4. The petitioners having entered appearance filed their objections to the show cause notice issued from this Court. One of the objections being that the application under the combined provisions of Sections 8 and 20 of the Act is not maintainable in law. The other objections since are not relevant for this Revision are not referred to in this Order.

5. That, the respondent had filed two applications along with application under Sections 8 and 20 of the Act, one under Order 39 Rules 1 and 2 CPC and another, under Order XL Rule 1 CPC read with Section 41 of the Act, for an order of temporary injunction and for appointment of Receiver. The learned Civil Judge, Hospet by common order dated 16-4-1993 granted both the applications, and restrained the petitioners from doing the business transaction of the schedule mining area of the firm through any account other than Current A/c 61 with the Canara Bank, Hospet opened in the name of the Firm consisting of the partners - the petitioners and respondents, and appointed petitioner-1, who is respondent-1 before the Court below as the Receiver to do and to carry on the mining business of the firm subject to certain conditions.

6. The petitioners having been aggrieved by the aforesaid orders presented two Revision Petitions before this Court in C.R.P.Nos. 1448/93 and 1506/92. That, the aforesaid Revision Petitions came to be disposed of by the Order dated 12-7-1994 in terms of the joint Memo filed by the parties, which reads as follows :

JOINT MEMO

Both the parties to the aforesaid case agree as under:

1. Petitioners will operate new A/c No. 1000 opened in the name of the firm in the Canara Bank, Hospet only and no other account in any other Bank will be opened.

2. Accounts extracts will be filed in lower Court once in four months and audited accounts will be filed in trial court once a year after accounts are audited.

3. As and when the petitioners draw the money from the partnership account equivalent to their respective shares, the petitioners will deposit respondents'' share to the extent of 25% in the court below and the withdrawals by the petitioners and deposit in the Court will be subject to the ultimate audited statement of profit and loss. In case no withdrawals are made during the middle of the year, the amounts equivalent to the respondent''s share will be deposited after the end of the account year as found due according to the audited balance

sheet.

4. The order on I.As. I and II of the lower court may be modified accordingly.

Bangalore, Sd/- Dated: 07-09-1993 Advocate for petitioners Sd Advocate for respondent."

7. That during the pendency of the aforesaid Petitions, the respondent filed another application, IA No. III before the learned Civil Judge, u/s 41 read with II Schedule of the Act read with Section 151 CPC for a direction to the petitioners to pay or deposit into the Court a sum of Rs. 3,81,000/- plus Rs. 3,00,000/- being his share of profits for the assessment year 1992-93 and for the period when they illegally expelled him. The claim of the respondent was contested by the petitioners. The learned Civil Judge, by his order dated 4-11-1993 directed the petitioners to pay or deposit a sum of Rs. 2,88,495/- on the ground that, in the audited statement of accounts for the year 1992-93 it is admitted that the aforesaid sum excluding his share of Income Tax is due to the respondent towards his share of profit. Being aggrieved by the said order, the petitioners have presented this Petition.

8, Sri D.L.N. Rao, learned Counsel for the petitioners, submits that the order under Revision is invalid and without jurisdiction, for that,

(i) The application under the combined provisions of Sections 8 and 20 of the Act is not maintainable and hence no direction can be made in an incompetent application and any order, without deciding the aforesaid question is unsustainable in law.

(ii) The amount shown in the audited statement of account as provided towards his share (respondent''s share) cannot be paid to him as it is the practice in the business that it would be put into re-circulation for the purpose of business such as discharge of loan, purchase of materials etc.

(iii) The Court has no jurisdiction to make the order under Revision in respect of a matter not connected with the point of Reference and the dispute. He submits that as no Reference has been sought, for determination of amount in respect of a period anterior to the date of expulsion, the date of suit and the date of Reference, the order under Revision is without jurisdiction.

9. Sri G.V. Shantharaju, and Sri Nanjunda Reddy, learned Counsel appearing for the respondent, per contra, submit that by virtue of Clause (b) of Section 41 read with items 2 and 4 of If Schedule of the Act, all questions connected with the dispute in respect of partnership Firm will get attracted and therefore there is no prohibition or inhibition for the Court to make an order in respect of a point touching the business, though it is anterior to the date of Reference and the respondent cannot be driven to a suit to recover the said money, as the same is not the intention of the Act.

10. The first contention raised by Sri D.L.N. Rao, learned Counsel for the

petitioners, regarding the maintainability of the main application does not survive for consideration for the purpose of this Petition, for the parties to the earlier Revision Petitions have settled the matter by filing a joint Memo without making any reference to the maintainability of the application. The petitioners are therefore precluded from raising the said question in this Petition. Even otherwise, without expressing any opinion, it may be stated at this stage, that the application under the combined provisions of Sections 8 and 20 of the Act cannot be held to be not maintainable, for the maintainability of the application, will be determined on the basis of the prayer made therein and not solely on the basis of the provision of law under which it is purported to have been filed. Further Sri D.L.N. Rao, learned Counsel for the petitioners, submits that he would not press this objection for the purpose of this Petition. Hence the first objection of Sri D.L.N. Rao is kept open to be decided by the trial Court at the appropriate stage.

11. That, as the decision on the second objection depends upon the decision upon third objection, I shall first deal with the third objection relating to the jurisdiction of the Court to make the order under Revision u/s 41 read with II Schedule of the Act. Section 41 of the Act reads as follows :

"41. PROCEDURE AND POWERS OF COURT.-

Subject to the provisions of this Act and of Rules made thereunder -

(a) the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings before the Court, and to all appeals, under this Act, and

(b) the Court shall have, for the purpose of, and in relation to arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court :

Provided that nothing in Clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters."

It is admitted by Sri Nanjunda Reddy, learned Counsel for the respondent, that the source of power of the Court to make any order on any interlocutory application in a proceeding u/s 20 of the Act is traceable only to Section 41 and II Schedule of the Act and to no other provisions. In view of this admission, it is necessary to examine the purport and intent of Section 41 of the Act, in order to determine whether the Court has jurisdiction to make the order under Revision. It is seen from Section 41 of the Act, that the provisions of CPC are applicable subject to the provisions of the Act as per Section 41(a) of the Act and, Section 41(b) empowers the Court to make interim orders, "for the purpose of and in relation to arbitration proceedings" in respect of the matters set out in the Second Schedule, in the same manner as provided "for the purpose of and in relation to any proceedings" before the Court. Again this power is further controlled by the Proviso by declaring that such power cannot be exercised to the prejudice of any power vested in the Arbitrator or Umpire for making, orders with respect to any of such matters. Therefore in order to exercise its power u/s 41 of the Act, the Court must be satisfied that the interim order or direction shall be "for the purpose of and in relation to arbitration proceedings" before the Court in respect of items set out in the Second Schedule and it shall not prejudice the powers vested in the Arbitrator or Umpire. The interim order/direction shall be made only "for the purpose of and in relation to arbitration proceedings" and not to frustrate the same. If the interim order is not "for the purpose of and in relation to arbitration proceedings" nor in respect of items covered by Second Schedule, the order would be without jurisdiction.

12. The Calcutta High Court in Debendra Nath Singha and Others Vs. Dwijendra Nath Singha and Others, dealing with the scope and object of Section 41 of the Act, has stated as follows :

"33. The instant case concerns and involves the interpretation of Section 41(b), particularly the proviso contained therein. Section 41(b), to my mind clearly empowers the Court to make appropriate orders in respect of any of the matters set out in the Second Schedule and matters set out in the Second Schedule include interim injunction and appointment of a receiver. By virtue of Section 41(b) the Court, therefore, enjoys, for the purpose of, and (SIC) to, arbitration proceedings, the same power of appointing any receiver or making any order of interim injunction, as the Court has for the purpose of, and in relation to, any proceedings before the Court. There cannot, therefore, be any question, in my opinion, as to the power and jurisdiction of the Court to appoint a receiver or to make any order of interim injunction, for the purpose of, and in relation to arbitration proceedings. This undoubted power and jurisdiction, which have been conferred on the Court by Section 41(b), do not, however, appear to be unrestricted or unqualified. The later part of Section 41(b), containing the proviso, qualifies the exercise of the power and jurisdiction ; and the proviso contained in Section 41(b) curtails this power and restricts the exercise of this power to The extent stated in the said proviso. The proviso lays down that the power and jurisdiction conferred on the Court by Section 41(b) shall not prejudice any power which may be vested in an Arbitrator or umpire for making orders with respect to any of such matters.

This proviso to the Section, to my mind, therefore, curtails or limits the power and jurisdiction of the Court conferred by the said Section in the matter of appointing any receiver or making any order of interim injunction and the same, in any event, controls the exercise of the said power and jurisdiction ; and the said power and jurisdiction are not to be exercised, if the exercise of the said power and jurisdiction prejudices any powers which may have been vested in an Arbitrator or Umpire for making any orders with regard to such matters. On a proper construction of Section 41 of the Arbitration Act and of Section 41(b) in particular, I am of the opinion, that the Court has the power and jurisdiction to appoint a receiver or to make any order of interim injunction or to make orders in respect of other matters set out in the Second Schedule in appropriate cases for the purpose of, and in relation to arbitration proceedings; but this power and jurisdiction of the Court cannot be exercised, if the exercise of any such power would prejudice any power which might be vested in an Arbitrator or Umpire for making orders with respect to any of such matters. I am further of the opinion that in view of the provisions contained in Section 41 of the Arbitration Act, the power and jurisdiction of the Court to appoint a receiver or to make any order of interim injunction or any order in respect of the other matters set out in the Second Schedule are now governed, controlled and regulated by the said Section, and apart from the power and jurisdiction conferred by the said Section, the Court has no power and jurisdiction independently of the provisions contained in the said Section 41 to appoint a receiver, to make any order of interim injunction or any order in respect of the other matters set out in the Second Schedule."

13. The matter in dispute before the Court is in relation to, the authority of the petitioners to expel the respondent from partnership which is stated to be of a joint family and the right of the respondent to continue as partner despite such expulsion and his right to receive his share of profits from the date of such expulsion. Any matter, if it is in dispute, anterior to the date of expulsion and not sought to be referred, cannot be said to be a matter "in relation to arbitration proceedings."

14. Admittedly the matter in dispute in this Revision Petition is the competency of the Court to direct the petitioners to pay or deposit the share of profits payable to the respondent for the assessment year 1992-93 payable as on 31-3-1992. According to the respondent the expulsion was made on 12-9-1992. The application under Sections 8 and 20 of the Act was filed subsequent to 12-9-1992. The points of dispute are also stated in the application. In view of the fact that the actual dispute between the parties has admittedly commenced just immediately prior to 12-9-1992, it is not possible to hold that the liability of the petitioners to pay the share of profits of the respondent as on 31-3-1992 would come within the purview of the matter "in relation to arbitration proceedings."

15. Item I of Second Schedule deals with the preservation, interim custody or sale of any goods which are the subject matter of reference. Item II deals with securing the amount in difference in the reference. Item III relates to the detention, preservation or inspection of any property or thing which is the subject matter of the Reference and consequential directions to be issued in furtherance of such detention, preservation or inspection of the property or thing which is the subject matter of Reference. Item IV relates to issue of interim injunction or the appointment of receiver and Item V deals with the appointment of a guardian for a minor or person of unsound mind for the purpose of arbitration proceedings.

16. The order directing the petitioners to deposit a sum of Rs. 2,88,495/-

payable to the respondent as on 31-3-1992 towards his share of profits is not by any stretch of imagination covered by the items indicated in Second Schedule of the Act. The respondent, may be entitled to receive the aforesaid sum, without resorting to a suit, in case the terms of Reference is enlarged. But such a direction cannot be issued on an interlocutory application, as the Court has got power to make interim orders only "for the purpose of and in relation to arbitration proceedings" before the Court and Clause (b) of Section 41 circumscribes the Court''s power within the limits indicated in the Second Schedule and further qualifies it by declaring in the Proviso that it cannot be used to the prejudice of the powers of the Arbitrators. The order under Revision is therefore without jurisdiction.

In the result, I make the following order -

(i) The Civil Revision Petition is allowed.

(ii) The order dated 4-11-1993 passed by the learned Civil Judge, Hospet, on I.A.No. III in Arbitration Case No. 2/92 is hereby set aside with no order as to costs.

