

(1997) 02 PAT CK 0046

In the Patna High Court

Case No : Appeal from Original Order No. 512 of 1991 (R)

Nazeeb @ Nazeeba Zaman

APPELLANT

Vs

Khalique Zaman and Otrs.

RESPONDENT

Date of Decision : 07-02-1997

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : (1997) 2 BLJR 962 : (1998) 1 CivCC 242

Hon'ble Judges : S.K. Chattopadhyaya, J

Bench : Single Bench

Final Decision : Allowed

Judgement

S.K. Chattopadhyaya, J.—The plaintiff/appellant has impugned the order dated 21. 5.91 passed in title suit No. 47/91. The plaintiff filed the aforesaid suit for the following reliefs:

(A) the partnership firm being Gulmarg Refrigeration be dissolved.

(B) the defendants may be directed to render accounts and after rendering the accounts of the firm be settled.

(C) the defendants maybe restrained to interfere with the running of the business.

2. The plaintiff and the defendants constitute a partnership firm to carry on the business in the name and style of Gulmarg Refrigeration. The terms and conditions of the partnership were incorporated in a deed dated 9th September, 1979. It is asserted that though all the partners were to have equal shares in interest of business and each of them shall contribute towards the capital in equal amounts, the defendants were not honest and sincere in their efforts. The defendants always tried to misappropriate the fund and oust the plaintiff from the business. Subsequently by practising fraud a deed of dissolution of partnership firm was created showing the plaintiff as one of the partners. The

said partnership firm was shown to have been dissolved though according to the plaintiff the said sale deed was a fabricated one and on the basis of that partnership was not dissolved. Subsequently the defendants started the business in the name of Nawab Ice and Cold Stores by forming another partnership firm among themselves. Subsequently the firm, Gulmarg Refrigeration was dissolved but the accounts of the said firm was not settled and the defendants having voluntarily retired from the firm, Gulmarg Refrigeration. The plaintiff is carrying on the said business along. By putting all sorts of obstruction, the defendants are trying for the closure of the business in spite of best efforts by the plaintiff for the survival of the said firm. In order to get the said firm closed, the defendants had written letter to the Bihar State Electricity Board to disconnect the electric line and also lodged false complaint before the police against the plaintiff. Due to such hindrance and interference on the part of the defendants, the plaintiff is not in a position to carry on the said business and, as such, prayed for the dissolution of the said partnership firm after settling the bank accounts etc.

3. The defendant Nos. 2 and 3 filed a petition for staying the proceeding of the suit on the ground that there being an arbitration clause in the agreement, the matter by referred to the arbitrator. However, no argument was advanced before the court below on behalf of defendant No. 2 on the point of stay. Defendant No. 3 asserted that the firm, Gulmarg Refrigeration came into existence on the basis of an agreement dated 10.9.78 entered into by and between five partners, the 5th partner being late Md. Quamruzzaman who was the father of all the other partners. After the death of their father all the four brothers mutually agreed and entered into a fresh agreement on 25.12.85 to carry on the said firm in accordance with law, the terms and conditions were already laid down in the agreement dated 10.9.78. These terms and conditions were binding upon all the parties and according to clause 15 of the said earlier agreement, in case of any dispute or any difference in respect of the said partnership firm the matter shall be referred to the arbitrator according to the provisions of the Arbitration Act. The dispute will be decided by the arbitrator and an umpire be appointed by the disputing partners and the decision shall have binding force upon all the partners. Defendants No. 3 alleged that the plaintiff has filed the instant suit in violation of the arbitration clause of the partnership agreement dated 10.9.78 and considering the cordial relationship between the parties the matter should be referred to the arbitrator. With these facts defendant No. 3 prayed before the court to stay the whole proceeding in the suit including the petition filed by the plaintiff for interim injunction.

4. After hearing the parties, the learned court below though did not stay the hearing of the injunction petition but stayed the entire proceeding in the suit in exercise of its power u/s 34 of the Arbitration Act.

5. Mr. P.K. Prasad, learned Counsel appearing on behalf of the appellant has contended that the court below has exceeded its jurisdiction by staying the proceeding of the suit by invoking the provisions of Section 34 of the Arbitration

Act inasmuch as the conditions for staying a suit of such nature did not exist before the court below. Elaborating his argument learned Counsel submitted that there is no averment in the petition filed by defendant No. 3 that he was ready and willing to go for arbitration at the commencement of the proceeding. He further contends that the court below has completely erred in holding that the number of arbitrators mentioned in clause 1 were by mistake and the same can be rectified at any time.

6. Defendant No. 3 being noticed appeared through Mr. A. Allam by filing vakalatnama and counter affidavit but at the time of hearing of the appeal, he has categorically stated that he has no instruction to argue the case on behalf of defendant No. 3. By order dated 23.7.92 service of notice on respondents 1 and 2 were accepted as valid on their refusal.

7. It is now well settled that in order to see that stay can be granted under the Act, following conditions must be fulfilled.

(i) there must be a valid arbitration agreement covering the question in dispute.

(ii) the application for stay must be entitled to rely on the terms of the agreement; that means that he must be either contracting party or one claiming in such a party.

(iii) Any step must have been taken by the applicant after appearance in the suit for participating in any proceeding or appearing, shall be deemed to be an act of waiver on the part of the applicant.

(iv) the applicant for stay must be ready and willing to go in for arbitration at the commencement of the proceeding.

(v) the court, must be satisfied that there is no sufficient reason why the matter should not be referred to the arbitration in accordance with the terms of the agreement.

8. If these requisite conditions are fulfilled then it is for the parties who wishes the matter to be litigate in the court, rather than to have it settled before a tribunal or forum of his choice, should show that the matter is one which ought not to be referred or which does not warrant stay of the proceeding.

9. On these backdrops if the rival assertions of the parties are looked into, it will appear that the plaintiff and the three defendants are own brothers and that their father late Md. Quamruzzaman entered into an agreement of 10.9.78 constituted the firm, Gulmarg Refrigeration. Till the death of father on 13.12.85 this partnership was doing their business but after father's death the four brothers (i.e. the remaining four partners) entered into another agreement on 25.12.85 to carry on the said firm, Gulmarg Refrgeration by following the same terms and conditions which were in the agreement dated 10.9.78.

10. As the plaintiff felt aggrieved by the conduct of his three other brothers he filed a suit for dissolution of the partnership firm on the ground that by playing

fraud upon him, the other three brothers dissolved the firm, Gulmarg Refrigeration and started another business in the name of Nawab Ice and Cold Stores without rendering any account of the erstwhile firm. The plaintiff of his own tried to carry on with the said firm, Gulmarg Refrigeration but the defendants have been trying to put obstruction in the smooth running of the said firm. The defendant No. 3, however, without controverting the assertion made by the plaintiff in the plaint, has taken a plea in his petition u/s 34 of the Arbitration Act that as because there was an agreement clause, the matter should be referred to the arbitrator.

11. It is pertinent to mention here that nowhere the defendant No. 3 being the applicant for stay has shown his readiness and willingness to go in for arbitration at the commencement of the proceeding.

12. From perusal of the impugned order it appears that the learned court below has failed to notice these cardinal principle before invoking his jurisdiction u/s 34 of the Act. It was only satisfied from the averments made in the plaint and the petition filed by the applicant that there is a dispute among the partners though he noticed that there was no specific pleading in the application u/s 34 of the Act about the dispute. Relying on a decision reported in Vashdev Bheroomal Pamnai Vs. M. Bipinkumar and Co., , the learned court below simply stayed the entire proceeding of the suit rejecting, however, the prayer to stay the hearing of the injunction petition.

13. It appears that the trial court was of the opinion that as because there was a clause for referring the dispute to the arbitrary, the suit must be stayed ignoring the fact that defendant No. 3 in his petition never stated that he was ready and willing to go in for arbitrator at the commencement of the proceeding.

14. In the case of N.C. Padmanabhan and Others Vs. S. Srinivasan, , it has been held that a party who invokes Section 34 must specifically allege that he was, not only at the commencement of the suit quite ready and willing to have the dispute resolved by arbitration proceeding but that he is throughout ready and willing for such arbitration and do everything necessary for the proper and succesful conduct of the arbitration proceeding. Thus according to this judgment readiness and willingness to do everything necessary for the proper conduct of the arbitration proceeding should cover the entire period both before the commencement of the suit and, thereafter. Readiness of the defendant should not be a matter of implication but there should be clear and ambiguous specific averment to that effect in an affidavit filed by the applicant for the stay of the suit.

15. I have already notied above that there are five conditions which must be satisfied before an order of stay of the suit u/s 34 of the Act can be prayed for. My aforesaid view finds support from a Division Bench decision of this Court in the case of Avtar Singh Gujral Vs. The Board of Directors and Others, .

16. From the narration of above facts it would be evident that after filing of the

petition u/s 34 of the Act defendant No. 3 did not take any step which can be reasonable to show his willingness and readiness to go in for arbitration at the commencement of the proceeding. Even in the petition itself he has as stated about his readiness and willingness for sending the matter before the arbitrator. This aspect of the matter curiously has been overlooked by the learned court below.

17. The argument of Mr. Prasad that the language of the arbitration clause No. 15 is vague, is also another consideration for deciding as to whether the dispute between the parties should be resolved by Civil Court or should be sent to the arbitrator. In a case of partnership firm where language of the arbitration clause is vague in respect of the dispute in connection with dissolution of the partnership firm and setting its accounts, all these issues can be decided in the suit which is comprehensive for it to decide between the parties coupled with the fact that the partnership firm has been constituted by four brothers who, as partners of the firm, are not disputing with each other. It is not desirable under these circumstances that the parties should have their disputes decided by the arbitrators in much as the decisions on the dispute between the parties before the arbitrators would delay the matter and it would not be advantageous to the parties.

18. After going through the reasonings given by the court below I am of the opinion that the trial court has failed to appreciate some of the salient features for staying the entire proceeding of the suit.

19. In the result, this appeal is allowed. The impugned order dated 21.5.91 passed in title suit No. 47/91 is set aside. As the suit is pending since 1991, I direct the trial court to dispose of the same without any further delay. As nobody contested on behalf of the respondents, there will be no order as to costs.