

(2003) 04 MAD CK 0175

In the Madras High Court

Case No : C.R.P. (P.D.) No. 1569 of 2002

R. Arulsigamani and Another

APPELLANT

Vs

Pauldurai alias Perumal

RESPONDENT

Date of Decision : 08-04-2003

Acts Referred:

Arbitration Act, 1940 — Section 20, 34, 8

Arbitration and Conciliation Act, 1996 — Section 21, 85(2)

Citation : (2003) 3 ARBLR 34 : (2003) 2 MLJ 404

Hon'ble Judges : K. Raviraja Pandian, J

Bench : Single Bench

Advocate : V. Shanmugham, for the Appellant; P. Peppin Fernando, for the Respondent

Final Decision : Dismissed

Judgement

K. Raviraja Pandian, J.—In this revision, the petitioners questioned the correctness of the order dated 16.04.2002 made in I.A. No. 200 of 1993 in O.S. No. 39 of 1993 on the file of the II Additional Subordinate Judge's Court, Tirunelveli.

2. In order to resolve the issue, the brief facts of the case are as follows :

The petitioners together with defendants No. 1, 4 and 5 formed a partnership firm in the name and style of "Kumari Minerals", which engaged in mining and dealing in Mineral called garnet sand. The firm obtained mining lease in G.O.Ms. No. 700, Industries Department, dated 15.05.1974 for the purpose of mining, originally for a period of twenty years and subsequently the period has been renewed. Originally, the firm Kumari Minerals was started on 12.02.1973 with two partners viz., defendants 1 and 2 and the firm was duly registered with the Sub-Registrar, Kanyakumari. The very purpose of formation of partnership is the condition contained in mineral concession rules to the effect that the lease would be granted only in the name of a registered firm or registered body corporate. Subsequent to the registration of firm, several partners were inducted and

several other original partners were retired. Necessary documents were executed for induction as well as retirement of partners of the firm from time to time. The core contention of the petitioners/plaintiffs in the suit is that the respondent/first defendant is acting against the interest of the partnership firm by inducting partners and forming separate partnership to do the very same business with one V.V. Minerals, which has been arrayed as the 17th defendant and virtually causing loss to the partnership firm. The induction of the new partner has been characterised as fraud played on the partnership and for that purpose, the Registrar of the firm has been arrayed as a party and it has also been contended that the first defendant on behalf of the firm has applied for and obtained permit for transportation of the quarried minerals and exported the same to the detriment of the partnership firm. With these pleadings, the suit has been filed for a declaration declaring the entry of new partners and the change in constitution of "Kumari Minerals" are void and restraining defendants No. 2, 3 and 6 to 11 from in any manner representing or claiming as partners of "Kumari Minerals" and for further declaration that the plaintiffs and defendants 1, 4 and 5 are the lessees under the lease deed dated 12.11.1974 executed pursuant to the grant of lease by the Government in G.O. Ms. No. 700 and consequently restraining the statutory defendants 12 to 15 from granting mining permit or movement permit of the mineral quarried and directing defendants 1 to 11 to account for the transactions of the mining of the quarry. The said suit was filed in February, 1993.

3. In the said suit, the respondent/first defendant filed an Interlocutory Application in I.A. No. 200 of 1993 u/s 34 of the Arbitration Act, 1940 by contending that the respondent and the petitioners have entered into a registered partnership in the name and style of "Kumari Minerals" for quarrying and selling minerals. The firm was duly registered. The firm had often inducted new partners and also allowed various other partners to retire periodically but the respondent have been all along a partner of the firm. In the partnership agreement dated 01.10.1979, there is a clause for referring any dispute arising out of or touching upon the partnership firm to the Arbitrator. Though several partners have been subsequently inducted and several other partners were allowed to be retired, the arbitration clause in the partnership deed dated 01.10.1979 is always in force. The subsequent agreements were only an addenda to the already existing clauses, which has not been varied or deleted. Hence, as per the arbitration clause, if any dispute arises between the partners touching upon or in connection with the partnership firm, the dispute has to be referred to Arbitrators.

4. The respondent's further case is that except Mrs. Chitraboopathy Ammal, the third respondent in the application, all other respondents including the petitioners" Arulsigamani and Mani instituted a suit in O.S. No. 213 of 1989 on the file of Sub-Court, Nagercoil against the respondent herein. The said Chitraboopathy Ammal, got impleaded herself as a party to the said suit. The suit has been filed on the ground that the first defendant/the respondent herein

acted against the interest of the firm with the very same allegations as that of the present suit and sought for an injunction restraining the respondents from acting against the interest of the firm. Along with the suit, the petitioners also filed an application for injunction. The suit has been subsequently transferred to the file of the Sub-Court, Padmanabhapuram and re-numbered as O.S. No. 16 of 1990. In that suit, the respondent herein filed an interlocutory application in I.A. No. 153 of 1990 raising the very same contentions that are raised in the present application. The petitioners resisted that application contending that there is no arbitration clause. After elaborate arguments, the Sub-Court found that the arbitration clause contained in the deed dated 01.10.1979 is binding on the parties and stayed the suit. That order has become final since the same has not been agitated further before any other competent Court. Incidentally the interim injunction application filed along with the said suit was also dismissed. Subsequently, for the very same reason, the suit in O.S. No. 16 of 1990 was also dismissed against the petitioners. Even that dismissal has not been challenged by the petitioners.

5. However, in order to give trouble to the respondent and total disregard to the order of stay made by the competent Civil Court in I.A. No. 153 of 1990 and also the dismissal of the suit against the petitioners, the petitioners thought it fit to implead the statutory authorities and camouflaged the relief in the present suit. But the averments contained in the plaint would reveal that the core contention of the petitioners is that the respondent is acting against the interest of the petitioners. On that count, the respondent herein sought for stay of the suit u/s 34 of the Arbitration Act, 1940, (hereinafter referred to as "the 1940 Act"). The petitioners filed counter to that application. In the said counter, the stand taken by the petitioners was that the application has been filed mala fide and there was a direction in a writ petition filed by the petitioners to resolve the inter se dispute between the partners of the firm in a competent Civil Court, which has been confirmed in writ appeal also by the Division Bench of this Court. When such a direction has been given, the suit should not be stayed on the ground of existence of arbitration agreement. The trial Court allowed that application. The correctness of the said order is now challenged in this revision petition.

6. The learned counsel appearing for the petitioners has very strenuously contended that application in I.A. No. 200 of 1993 has been filed u/s 34 of the Act, 1940, when the Act was in force, but the order in that application has been passed on 16.04.2002 after the 1940 Act has been repealed and Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act") came into force i.e., after 25.01.1996. As per Section 85(2)(a) read with Section 21 of the 1996 Act, only the arbitration proceedings commenced prior to the crucial date 25.01.1996 are saved. All other proceedings are abated. Hence, the order of the trial Court, which has been passed subsequent to coming into force of the 1996 Act cannot be legally sustained. In order to sustain his contention, the learned counsel relied on the decisions viz., Shetty's Constructions Co. Pvt. Ltd. Vs. Konkan Railway Construction and Another, Thyssen Stahlunion GmbH Vs. Steel

Authority of India Ltd., and Varun Seacon Ltd. Vs. Bharat Bijlee Ltd., . The learned counsel also contended that the reasoning given by the trial Court that the order passed in the application in I.A. No. 153 of 1990 would operate as res judicata and the petitioners are estopped is also incorrect in the absence of any pleading to that effect.

7. On the other hand, the learned counsel appearing for the respondent argued for sustaining the order of the trial Court.

8. I heard the arguments of the learned counsel on either side and perused the material on record.

9. In the case of Shetty's Constructions, stated (supra), the Supreme Court after taking into consideration Sections 85 and 21 of the 1996 Act, has held that the new Act came into force on 26.1.1996. Section 21 of the 1996 Act lays down that unless otherwise agreed to between the parties, the arbitration suit in respect of arbitration dispute commenced on the date on which the request for referring the dispute for arbitration is received by the respondents. Referring to that ruling of the Supreme Court, the learned counsel for the petitioners contended that there is no request, whatsoever, from the respondent herein to refer the dispute to the Arbitrator, even assuming that there is an arbitration clause in the partnership deed. On the other hand, prior to the crucial date of 25.01.1996, the petitioners simply filed an application in I.A. No. 200 of 1993 in the month of March, 1993. In the absence of any request to refer the matter for arbitration, as per the judgment of the Supreme Court, the order passed by the trial Court cannot be legally sustained since all the proceedings initiated under the provisions of the 1940 Act have not been saved. He further contended that Section 6 of the General Clauses Act also would not come to the rescue of the respondent in view of the saving clause contained in the 1966 Act, which substantially saved the arbitration proceedings initiated prior to the date 25.01.1996. The judgment of the Gujarat High Court in Varun Seacon Limited v. Bharat Bijlee Limited (supra), is also to the same effect.

10. The other decision Thyssen Stahlunion GMBH v. Steel Authority of India Limited (supra), relied on by the learned counsel for the petitioners followed the earlier decision in Shetty's Constructions case (supra).

11. I am not able to concur with the learned counsel for the petitioners in the above said contention. The scope, the object and the purpose and the consideration necessary for dealing with and disposing of an application u/s 34 of 1940 Act is that Section 34 of the 1940 Act provided for filing an application to stay legal proceedings instituted by any party to an arbitration agreement against any other party to such agreement, in derogation of the arbitration clause and attempts for settlement of disputes, otherwise than in accordance with the arbitration clause by substantiating the existence of an arbitration clause and the judicial authority concerned may stay such proceedings on being satisfied that the decision is in accordance with the arbitration agreement and

the applicant seeking for stay was at the time when the proceedings were commenced and still remained ready and willing to do all things necessary to the proper conduct of the arbitration. This provision under the 1940 Act had nothing to do with the actual reference to the arbitration of the disputes and that was left to be taken care of under Sections 8 and 20 of the 1940 Act. In striking contrast to the said claim underlying the provisions of the 1940 Act, in the new Act 1996, there is no corresponding provision to Section 34 of the old Act. Section 8 of 1996 Act mandates that the judicial authority before which an action has been brought in respect of a matter, which is the subject matter of an arbitration agreement, shall refer the parties to arbitration if a party to such an agreement applies not later than when submitting his first statement.

12. In the case on hand, the petitioners are aggrieved by the conduct of the respondent on the ground that he was acting against the interests of the firm, rushed to the Court by filing the earlier suit in the year 1989 as well as the present suit in the year 1993. There was no prior notice issued by the petitioners about the dispute to be resolved between themselves or about the conduct of the respondent in acting against the interest of the firm or intimating the intention of the petitioners that if the respondent did not mend his conduct in acting against the firm, the petitioners would seek legal remedy in the Court of law so as to warrant the respondent to issue notice to the petitioners to refer the dispute for arbitration invoking the arbitration clause. As a matter of fact, the existence of such clause itself was denied by the petitioners. The respondent is not having any grievance in the conduct of the firm. The dispute by the petitioners came to be known to the respondent only on service of notice of the suit. Upon filing the suit by the petitioners, the respondent acted immediately by filing an application u/s 34 of 1940 Act, as obviously that Act was in force at the time of filing of the suit, pointing out that there is an arbitration clause in the agreement dated 10.01.1979 and any dispute arising out of or touching upon the partnership firm has to be referred to the Arbitrator. The respondent herein has filed such an application in March, 1997 without participating in the proceedings. The action of the respondent in filing the said application has to be regarded as the respondent was at the time when the proceedings were commenced and still remained ready and willing to do all things necessary to the proper conduct of the arbitration. That would amount to request for the dispute to be referred to arbitration. In this context, it is relevant to refer the decision of the Apex Court in the case of Smt. Kalpana Kothari Vs. Smt. Sudha Yadav and Others, . In the said case, the respondent had filed a civil suit for dissolution of partnership and for accounts and also filed applications for appointment of receiver and for injunction. The defendants have initially filed applications in the suit before the trial Court invoking the provisions contained in Section 34 of the Arbitration Act, 1940 and not only the applications filed by the respondent before the trial Court were rejected but the applications u/s 34 of the Arbitration Act by the appellants came to be allowed and further proceedings in the suit filed by the respondent came to be stayed. At the appellate stage, after filing a written application for dismissal of

the applications filed by the appellants u/s 34 of the Arbitration Act, 1940, as not pressed in view of the repeal of the 1940 Act and coming into force of the 1996 Act and getting orders thereon, the appellants have once again moved the High Court u/s 8 of the Act with a request for stay of proceedings before the High Court as well as the trial Court. The application came to be rejected by the High Court that no such application could be filed, once the application earlier filed under the 1940 Act was got dismissed as not pressed and also on the ground of estoppel, based on the very same fact. On appeal, the Supreme Court held as follows :

"We are of the view that the High Court did not properly appreciate the relevant and respective scope, object and purpose as also the considerations necessary for dealing with and disposing of the respective applications envisaged u/s 34 of the 1940 Act and Section 8 of the 1996 Act. Section 34 of the 1940 Act provided for filing an application to stay legal proceedings instituted by any party to an arbitration agreement against any other party to such agreement, in derogation of the arbitration clause and attempts for settlement of disputes otherwise than in accordance with the arbitration clause by substantiating the existence of an arbitration clause and the judicial authority concerned may stay such proceedings on being satisfied that there is no sufficient reason as to why the matter should not be referred to for decision in accordance with the arbitration agreement, and that the applicant seeking for stay was at the time when the proceedings were commenced and still remained ready and willing to do all things necessary to the proper and conduct of the arbitration. This provision under the 1940 Act had nothing to do with actual reference to the arbitration of the disputes and that was left to be taken care of under Sections 8 and 20 of the 1940 Act. In striking contrast to the said scheme underlying the provisions of the 1940 Act, in the new 1996 Act, there is no provision corresponding to Section 34 of the old Act and Section 8 of the 1996 Act mandates that the judicial authority before which an action has been brought in respect of a matter, which is the subject matter of an arbitration agreement, shall refer the parties to arbitration if a party to such an agreement applies not later than when submitting his first statement. The provisions of the 1996 Act do not envisage the specific obtaining of any stay as under the 1940 Act, for the reason that not only the direction to make reference is mandatory but notwithstanding the pendency of the proceedings before the judicial authority or the making of an application u/s 8(1) of the 1996 Act, the arbitration proceedings are enabled, u/s 8(3) of the 1996 Act to be commenced or continued and an arbitral award also made unhampered by such pendency."

13. Section 21 of the 1996 Act on which much reliance has been placed by the learned counsel for the petitioners lays down that the arbitral proceedings in respect of a particular dispute commences on the date on which a request for that dispute to be referred to arbitration is received by the respondent. This Court in case of *The Cotton Corporation of India Limited v. Kanakadhara Spinning Mills (P) Limited* (2001) 3 CTC 591, while construing a similar phraseology

employed in Section 37(3) of the 1940 Act that an arbitration shall be limited to be commenced when one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an Arbitrator, where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement requiring that the difference be submitted to the person so named or designated, held that the terms of the notice cannot be very rigidly construed in a very hyper technical manner. The provisions of the Arbitration Act are applicable even to lay parties also and hence should be construed and interpreted liberally. The learned Judge in coming to such conclusion relied on a decision of the Supreme Court in the case of *The Union of India (UOI) Vs. D.N. Revri and Co. and Others*, wherein the Supreme Court has held that, "a contract is a commercial document between the parties and it must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate the same. It would not be right while interpreting a contract entered into between two lay parties to apply strict rules of construction which are ordinary applicable to a conveyance and other formal documents. The meaning of such a contract should be gathered by adopting a common sense approach and it may not be allowed to be parted to narrow pedantic legalistic interpretation". To commence the arbitration and to call upon the opposite party to initiate arbitration proceedings what is required is the substance of the stand taken by the party and not the mere format, (vide : *The Agios Laaros* (1976) 2 L.R. 47.

14. The intention of the respondent in the present suit in filing I.A. No. 200 of 1993 is to point out that there is an arbitration clause in the agreement dated 01.10.1979 and without referring the matter to the arbitration as per the arbitration clause, the petitioners cannot directly file a suit. Hence, the suit should be stayed. The intention to refer the arbitration clause and reliance on the same is made very clear in I.A. No. 200 of 1993. Hence the contention of the learned counsel for the petitioners that there was no request for referring the dispute to arbitration by the respondent so as to save the proceeding initiated under 1940 Act cannot be countenanced. The date of filing of the application u/s 34 of the 1940 Act, in the absence of any correspondence between the parties as to the dispute prior to the filing of the suit, being well within the date i.e., 25.01.1996, the proceedings has to be regarded as commenced on the date of filing of the application u/s 34 of the 1940 Act. Once such a conclusion is arrived at, the necessary corollary would be that the dispute has commenced prior to 25.01.1996, the date of coming into force of the 1996 Act. In *Shetty's Constructions* case (supra), the Apex Court after referring the provisions of 1996 Act as held that if such request had been made prior to the commencement of 1996 Act, the proceedings are governed by the old Act. The said judgment was followed with approval in the subsequent judgment of the Supreme Court in *Thyssen Stahlunion GMBH v. Steel Authority of India Limited* (supra).

15. On facts also, the petitioners are not able to succeed, because in the earlier suit filed by the petitioners herein in O.S. No. 16 of 1990 on almost the same

averments that the respondent was acting against the interest and conduct of the firm, at the instance of the respondent, an order of stay has been passed by the competent Civil Court u/s 34 of the 1940 Act. That order was passed prior to coming into force of the 1996 Act and has become final since no further proceedings were taken up by the petitioners against that order. Even the suit itself has been stated to be dismissed on the very same reasoning that the dispute has to be referred to an Arbitrator, as seen from the order of the trial Court, which runs as follows :

16. The above factual position has not been disputed by the petitioners. However, a contention has been raised that the relief sought for in the present suit i.e. O.S. No. 39 of 1993 is totally different from the relief sought for in the earlier suit O.S. No. 16 of 1990 and some other defendants in addition to the defendants in the earlier suit were also arrayed as parties seeking relief against them, which relief cannot be granted in the arbitration proceedings.

17. A perusal of the entire plaint averments would reveal that the basis for the suit is that the respondent is acting against the interest of the partnership firm by entering to partnership with the 17th defendants and also inducting some other partners and obtained permit for removal of the minerals from the statutory defendants on behalf of the firm to which he is not authorised.

18. Incidentally, it is also available in the plaint averments that in the writ petition filed by the petitioner in W.P. No. 801 of 1990 praying for the relief of issuance of writ of mandamus against the Collector of Tirunelveli as well as the Deputy Director of Geology and Mining, to forbear them from issuing mining permit on the application of the respondent alone. The Collector as well as the Deputy Director of Geology and Mining, the 14th and 15th defendants submitted before the writ Court that they were issuing permit in accordance with law to the respondent. In the plaint, at paragraph No. 17, it is averred that the statement so made by the statutory defendants are not true and they have suppressed the relevant materials to the Court. But the fact remains, this Court accepted the plea raised by the statutory defendants 14 and 15 in the writ petition and dismissed the writ petition. Hence, the arraying of the statutory authorities as defendants No. 14 and 15 would not make any difference in the present suit than the one of the earlier suit. It is also an admitted fact that the order of the single Judge dismissing the writ petition has also been affirmed on appeal. It is evident from the above facts, the petitioners, innocuously couched the relief in the suit and also arrayed some other defendants in order to show that the relief sought for cannot be granted in arbitration proceedings so as to defeat the claim of the respondent for reference to arbitration in vain.

19. Interestingly, it has to be noted that after the order passed in the earlier suit in I.A. No. 153 of 1990 has been projected in the affidavit filed in support of the application in I.A. No. 200 of 1993, it seems the petitioners herein thought it fit to agitate the stay order belatedly and filed an appeal against that order in I.A. No. 153 of 1990 along with an application to condone the delay of 3233 days,

which is more than eight years, which application has also been dismissed by the appellate Court. It is manifest that such filing of the suit has made only to contend before the trial Court that the petitioners have not abandoned the suit, but are still prosecuting.

20. When the factual position is that the order made in I.A. No. 153 of 1990 and also the dismissal of the suit in O.S. No. 16 of 1990 by the competent Civil Court is binding on the petitioners, they cannot wriggle out from the binding orders so made in the earlier suit and abandon it abruptly and contend that in view of the 1996 Act, the order passed in an application filed u/s 34 of the 1940 Act is not saved by the 1996 Act.

21. Though the contention as to res judicata has not been specifically pleaded before the trial Court as contended by the learned counsel for the petitioners, the respondent made pointed reference to the earlier suit and order of stay granted therein and documentary evidence to that effect also marked. On the contrary, the counter affidavit of the petitioner is as bald as anything except referring to the earlier writ proceedings initiated by the petitioners. The trial Court cannot be faulted in giving a finding on the basis of materials made available before it and borne out of records. Even assuming that the petitioners can succeed on the point of res judicata, technically, that would not any way further the case of the petitioners, since the question of applicability of the Act 1940 has been held against the stand of the petitioners. Hence, any further discussion on this point would be only academic.

22. Having regard to the law as enunciated by the Apex Court and having regard to the petitioner facts and in the circumstances of the case, the petitioners, I am of the view, have not made out any case, which requires this Court to interfere with the order of the trial Court. Hence the revision fails and the same is dismissed. However, there is no order as to costs.