

(1974) 09 MP CK 0012

In the Madhya Pradesh High Court

Case No : Miscellaneous First Appeal No. 119 of 1971

Rajkishore Guru Prasad Khatri, Satna and others

APPELLANT

Vs

Jwala Prasad Bhimraj

RESPONDENT

Date of Decision : 30-09-1974

Acts Referred:

Arbitration Act, 1940 — Section 32, 34
Partnership Act, 1932 — Section 32(1), 40, 41, 44, 44(g)

Citation : (1979) JLJ 150

Hon'ble Judges : M.L. Malik, J;A.P. Sen, J

Bench : Division Bench

Advocate : B.C. Verma, for the Appellant; Y.S. Dharmadhikari, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Sen, J.—This appeal by the defendants is directed against an order of the Additional District Judge, Satna, dated 8th September 1971, rejecting their application for stay of the proceedings in suit, u/s 34 of the Arbitration Act.

2. Shortly stated, the facts are that the plaintiff brought the suit for dissolution of partnership and rendition of accounts of the firm styled, "M/s Om Builders and Miners" Satna, constituted under the deed of partnership dated 29th October 1966. In the plaint, the plaintiff has levelled various charges of fraud, misappropriation of fund and other acts of misconduct against the defendants, seeking a dissolution of the firm on the ground that it was just and equitable u/s 44 (f) and (g) of the Partnership Act. It was alleged that due to the acts of malfeasance and misfeasance on the part of the defendants, as pleaded, the business of the partnership had come to a stand still and, indeed, could not be continued except at a loss.

3. It is not necessary for our purposes to go into the allegations in detail. Suffice it to say that specific charges of a serious nature, alleging fraud including acts and omissions, which involve breach of legal or equitable duty, trust or

confidence, have been made. It is alleged, for instance, that a sum of Rs. 81,000 withdrawn from the partnership till, which had to be deposited with Raurkela Steel Project as earnest money towards a contract, for which a draft was issued on 12th December, 1969, was instead credited by the defendants as earnest money for a tender submitted by their partnership firm styled, M/s Kisan Miners", and the amount of Rs. 60,000 deposited by them on that account, was encashed. Similarly, the defendants withdrew an amount of Rs. 40,000 from "M/s Om Builders and Miners" and invested the amount in the business of their firm "M/s. Kisan Miners", They also fraudulently utilised machines, tools and implements "of M/s. Om Builders and Miners" in the business of M/s. Kisan Miners.

4. In their application u/s 34 of the Act, the defendants sought stay of the proceedings on the ground that under the arbitration clause, the arbitrators had power to decide whether or not the partnership should be dissolved, and to settle the accounts upon its dissolution and, therefore, the disputes which had arisen, including those which carried such charges of misconduct as had been made, should be decided by the domestic forum which the parties had chosen and, therefore, the proceedings in suit ought to be stayed. Incidentally, the defendants, in their application, also joined issue on the various allegations made against them.

5. The learned Additional District Judge was convinced that the plaintiff has a substantial and bona fide cause of action and that on the affidavits a sufficient prima facie case of fraud has been made out. He, accordingly, declined to stay the suit, holding that the matter was outside the scope of the arbitration clause. That decision of his must, as it should be upheld not only on the ground stated, but on other grounds as well.

6. Clause 16 of the partnership deed provides --

16. That, any controversy or claim relating to this partnership or any breach in respect thereof shall be subject to Arbitration under the Indian Arbitration Act then in force. The decision arrived at by the Arbitration or Arbitrators as the case, may be, shall be binding on all the partners.

7. Shri Verma, counsel appearing on behalf of the appellants, drew our attention to clause 15 of the partnership deed, which is in the following terms:--

15. That, in case of death or retirement of a partner the firm shall not be dissolved but shall continue by making necessary revisions and admitting the legal heir of the deceased as may be agreed upon by the remaining partners and the legal heir of the deceased.

and says, on the strength of *Abbott v. Abbott* (1936) 3 All. ER 823, that the partnership not being a partnership at will, the plaintiff, if he was not desirous of continuing in the partnership, had the remedy to serve a notice of retirement under clause 13, and the continuing partners under the terms of clause 15 had the right to reconstitute the firm on such terms as they agreed He further says

that as the plaint is based on disputes of the parties during the continuance of the partnership, these disputes should be settled by arbitrators and not by recourse to the Courts. He contends, therefore, that the suit for dissolution of partnership should be stayed.

8. In our opinion, this contention cannot be supported. There is no doubt a distinction between "dissolution of a firm" and "retirement of a partner". A partner may under the Partnership Act withdraw from a firm--

--by dissolving the partnership (sections 40-41) ; or

--by retiring from it if he has a right to do so under any of the three subclauses of section 32(1).

The word "retire" used in section 32 of the Act is confined to cases where a partner withdraws from a firm and the remaining partners continue to carry on the business of the firm without dissolution of partnership as between them. It does not cover the case where a partner withdraws from a firm by dissolving it, which should properly be referred to as dissolution and not as a retirement. (See, Desai on Partnership, 4th Edition, p. 171). The legal principles are well settled.

9. Their Lordship of the Supreme Court have observed in *Karumuthu Thiagarajan Chettiar and Another Vs. E.M. Muthappa Chettiar*, thus--

Relinquishment of one partner's interest in favour of the other, which is provided in this contract, is a very different matter. It is true that in this particular case there were only two partners and the partnership will come to an end as soon as one partner relinquishes his right in favour of the other. That however is a fortuitous circumstance; for, if (for example) there had been four partners in this case and one of them relinquished his right in favour of the other partners, the partnership would not come to an end. That clearly shows that a term as to relinquishment of a partner's interest in favour of another would not make the partnership one at will.

10. In *Abbot v. Abbot* (supra), there were more than two partners and it was provided that the retirement of a partner would not terminate the partnership and there was an option for the purchase of the retiring partner's share by other partners. It was held that in the circumstances the partnership was not a partnership at will and it was pointed out that only when all the partners except one retired that the partnership would come to an end because there could not be a partnership with only one partner. In the case before us, clause 13 of the partnership deed is more or less similar.

11. Clause 13 of the deed reads :

13. That, any partner willing to retire from the partnership shall have to give at least six months notice in advance. In such case the profit and loss of the firm shall be determined upto the retiring date and partners' account shall be

adjusted by the amounts of profits or losses as the case may be according to their shares. The balance of amount standing to the retiring partners, account shall be paid to or recovered from him within such period as may be agreed upon by the partners looking to the financial position of the firm and the circumstances of the case. But the payment or recovery shall not ordinarily take more than three months from the date of retirement.

12. There can be no doubt that a partnership was not a partnership at will, but that makes no difference in principle. It is competent for a partner to retire with the consent of his co-partners at any time and upon any terms. It is also competent for him to retire without their consent by dissolving the firm, if he is in a position to dissolve it. The principle of law, which is stated in Lindley on Partnership (Twelfth Edition) p, 598 is incontrovertible, namely,

But there is only one method by which a partner can retire from a firm without the consent of his co-partners, and that is, by dissolving the firm.

The plaintiff had an option in the matter, and he could not be compelled to retire under clause 13 of the deed. The first contention, therefore, fails.

13. The question as to whether a partnership should be dissolved or not is a question within the arbitration clause, depends essentially on the particular terms of the arbitration clause in each case. The arbitration clause in a written submission agreed to by the parties to the contract, like all other written submissions to arbitration must be construed according to its language. To give a few illustrations, in *Joplin v. Postlethwaite* (1889) 61 LT 629, where an arbitration clause provided that--

all disputes touching the partnership deed or its construction, or any other thing relating to partnership,

It was held that an arbitrator had no power to say that the partnership shall be dissolved. Thus, in *Vawdrey v. Simpson* (1896) 1 Ch. 166, where the articles of a partnership, an arbitration clause referred to arbitration--

any dispute.....between the parties hereto, touching the terms stipulations and conditions of this agreement, or the construction thereof, or any matter in any way connected with these presents or the operation thereof, or the rights, duties and liabilities of either party in connection herewith,

It was held that the arbitrators had power to decide whether or not the partnership should be dissolved, and to award dissolution, notwithstanding that the partnership was for the term of the partners' joint lives. Similarly, in *Machin v. Bennett* 1900 WN 146, where the submission was "of all matters in difference in relation to the partnership affairs", it was held that whether there ought to be a dissolution was one of the affairs of the partnership and, therefore, was within the submission and proper to be determined by the arbitrators. (See also, *Ballavdas Acharjya v. Shyam Sunder Halwasiya* ILR (1946) 1 Cal. 203 and *Sailendra Nath Kumar v. Chiilar Ram* I L R (1951) 2 Cal. 140).

14. But this is a matter of discretion, and if the dispute is within the arbitration clause, the Court may stay proceedings in the suit and refer all questions including that of dissolution, to the arbitrator, and, if necessary, the Court will appoint a receiver pending the arbitration. The law on the subject is succinctly stated in Lindley on Partnership, 12th Edition, P. 482-3, thus--

The Court will decide whether the matters in dispute are or are not within the arbitration clause. Even if they are, the section is not imperative; and the Court in the exercise of its discretion has declined to stay proceedings where there were several matters in dispute, some only of which were within the agreement to refer, where one of the parties had become bankrupt; where there was a bona fide suggestion of fraud; where an action has been brought impeaching the agreement for reference; where the conduct of the person named as arbitrator was impeached; where he was necessarily in the position of judge and witness; where he had not dealt with the claim on its merits but merely with his jurisdiction to hear it; where there was really no question in dispute, and the defendant's only object was delay; where the object was to stop a suit, and not really to settle a dispute, which the defendant desired to refer before the suit was commenced; where the point in dispute was really a question of law, as, for instance, the validity of a notice of expulsion; where the party seeking to have the action stayed was held to have refused to submit the whole dispute to arbitration; where the question in issue was whether the partnership should be dissolved.

15. The weight of authority is clearly in support of the view that where the dissolution of a partnership involves the exercise of a judicial discretion u/s 44(g) of the Partnership Act, and which may involve the appointment of a receiver, the matter is one which is perhaps more conveniently left in the hands of the Court.

16. The provisions of section 44(g) of the Partnership Act confer upon the Court the salutary and necessary power to dissolve a firm whenever circumstances arise which render such action just and equitable. As observed by Sir Lawrence Jenkins, while delivering the judgment of their Lordships of the Privy Council in *Rehmatutmissa Begum v. Price* AIR 1917 Pri Council 116 : --

A partner's claim to a decree for dissolution rests, in its origin, not on contract, but on his inherent right to invoke the Court's protection on equitable grounds, in spite of the terms in which the rights and obligation of the partners may have been regulated and defined by the partnership contract.

17. In *The Raneegunge coal Association, Ltd. v. Tata Iron and Steel Co., Ltd.* ILR 53 Bom 271, at pp. 273 and 284, it has been held that a charge of fraud to be a ground for refusing a stay must be a specific charge clearly made and supported by particulars. That test is clearly fulfilled in the instant case. Here, the charges made in the plaint are clear and specific and full particulars are given in support of them. Charges made in this case, which not only fall u/s 44 (c) and (d), but also fall u/s 44(g) of the Act, which is outside the submission.

18. In some what similar circumstances, in Ganesh Chandra Dey and Another Vs. Kamal Kumar Agarwalla, , a learned judge of the Calcutta High Court has stated the law, thus--

Further the suit as framed has been instituted not only on the basis of the notice of dissolution of the partnership but also on the grounds that it is just and equitable to dissolve the partnership u/s 44(f) and (g) of the Indian Partnership Act. It appears from the words in the said language that the Court alone has jurisdiction to dissolve a partnership under the said sub-sections. It is quite possible that the parties may agree to have the question of dissolution of partnership u/s 44(f) and (g) also decided by arbitration. But in the present case such intention cannot be spelt out from the arbitration clause. Reliance may be made on *Oliver v. Hiller* (1959) 2 All E R 220, where an action claiming dissolution of the partnership on the ground that it was just and equitable to dissolve it has not been stayed although the arbitration clause provided that--

All disputes and questions whatsoever each shall either during the partnership or afterwards arise between the person.....touching this agreement or any account valuation or division of assets, debts and liabilities to be made hereunder.... shall be referred to a single arbitrator.

It may be added here that following the said English decision the Madras High Court in *N.C. Padmanabhan and Others Vs. S. Srinivasan*, , and the Calcutta High Court in *Madan Mohan Dey v. Satya Gopal Pal* (unreported judgment of A.N. Sen J. D/- 7-10-1966) in Award No. 105 of 1966 (Cal) have held that the dispute relating to dissolution of firm on the ground that it is just and equitable to do so should be decided by the Court and the Court should exercise its discretion in not staying the suit in spite of the arbitration clause. Reference may also be made to the Bench decision of this Court in *Sailendra Nath Kumar v. Chillar N. Ram*. We are in respectful agreement with these observations. The same view has also been taken in *N.C. Padmanabhan v. S. Shrinivasan* (supra). From the view that has been taken, the second contention must, therefore, also fail.

19. In conclusion, the appeal must fail and is, therefore, dismissed with costs. Hearing fee Rs. 100, if certified.