

(1986) 02 AHC CK 0062

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 6540 of 1980

Satya Prakash Kanoida

APPELLANT

Vs

IInd Civil Judge and Others

RESPONDENT

Date of Decision : 11-02-1986

Acts Referred:

Arbitration Act, 1940 — Section 2, 20, 6
Constitution of India, 1950 — Article 226

Citation : (1986) 02 AHC CK 0062

Hon'ble Judges : Ravi S. Dhavan, J

Bench : Single Bench

Advocate : J.N. Tewari, for the Appellant; S.O.P. Agarwal, for the Respondent

Final Decision : Dismissed

Judgement

Ravi S. Dhavan, J.—The present writ petition raises the issue in effect that notwithstanding the fact that there may be an agreement on record which contains an arbitration clause, a legal representative of one party to the agreement cannot have recourse to claims arising out of such an agreement. The legal representative of a partner one Murlidhar Kanodia instituted an application u/s 20 of the Arbitration Act of 1940 (hereinafter referred to as the Act) before the and Civil Judge, Kanpur (hereinafter referred to as the Civil Judge) by which they sought that the agreement in reference to the context, by which the aforesaid Murlidhar Kanodia was a partner be filed before the court and consequently a reference be made to an Arbitrator agreed to by the parties or in the event of disagreement between them, to an Arbitrator appointed by the court ; other consequential reliefs were also prayed for.

2. A preliminary objection was taken before the Civil Judge by the Petitioner who was arrayed as a Defendant-opposite party No. 3 before the Civil Judge, to the effect, that an application u/s 20 of the Act as filed, was not maintainable and without jurisdiction as upon the death of Murlidhar Kanodia the partnership deed stood dissolved and the agreement between the pawnors ceased to exist or be

operative. Upon this objection, the Petitioner sought, and a preliminary issue was framed and was numbered as issue no 3. This issue was to the effect: whether the application u/s 20 of the Act, as filed before the Civil Judge was maintainable or not? This preliminary issue was decided by the Civil Judge by an order dated 10th August, 1976. It was decided against the Petitioner (opposite party No. 3) and has given rise to the present writ petition under Article 226 of the Constitution of India. These are the facts which are relevant in so far as the present writ petition is concerned. The other facts which have been mentioned in the writ petition are the chronology of events placing on record that there was a partnership initially between Messrs Manoharlal Kanodia, Murlidhar Kanodia, Jagmohan Lai Kanodia and Mrs. Hira-ati Kanodia. Manoharlal Kanodia died in 1900 and a new partnership was constituted with the erstwhile three surviving partners and Satya Prakash Kanodia. The second partnership also did not last long when the aforesaid Satya Prakash Kanodia gave a notice dated 14th November, 1967 seeking a dissolution. Subsequently came a partnership, through a deed dated 5th January, 1968 between Messrs Murlidhar Kanodia, Jagmohanlal Kanodia and Hirawati Kanodia. This partnership was dated 2nd August 1970. This partnership saw dissolution too, upon the death of Murlidhar Kanodia, on the 2nd August, 1970. For the purposes of the present writ petition the chronology till the death of Murlidhar Kanodia is relevant (though it may be mentioned that there were subsequent partnerships also between some of the surviving partners and others). Suffice it to say that the record makes it abundantly clear that by and large the partners were the members of the family.

3. That once who moved the Court of the Civil Judge by an application u/s 20 of the Act were, the wife of Murlidhar Kanodia, Mrs. Sahodra Devi Kanodia and three sons, Jagdish Prasad Kanodia, Vijai Prakash Kanodia and Arvind Prakash Kanodia. In effect the heirs of Murlidhar Kanodia in reference to the time when he was a partner along with the others sought claims arising out of the agreement which bound the partners inter se. The heirs, in effect, sought accounting. This they contended in paragraph 5 of their application u/s 20 of the Act, aforesaid, had not been done either with their predecessor, through whom they had laid their claims, or with them. It is this application u/s 20 of the Act by the heirs of the aforesaid late Murlidhar Kanodia, which was objected to by the Respondent No. 3 on the ground that it was misconceived, not maintainable and without jurisdiction.

4. This Court has heard learned Counsel for the parties, that is, Mr. J.N. Tewari for the Petitioner and Mr. S.O.P. Agarwal for the Respondents. Learned Counsel for the Petitioner, Mr. J.N. Tewari, Senior Advocate, has contended in effect that the legal representatives of a deceased partner cannot sustain an application u/s 20 of the Act aforesaid. According to him should there be a claim which the heirs desire to maintain, then it can be maintained only by having recourse to a suit but not by invoking the agreement between the partners which contains the arbitration clause. It is further contended on behalf of the Petitioner that the agreement between the partners does not survive for the legal representatives of

a deceased partner.

5. This Court feels that much will depend upon what the partners had agreed to and the contention of the Petitioner must rest within the confines of the agreement between the partners. In attempting to ascertain the agreement between the partners it is necessary to scrutinise the record, as is available. Unfortunately, this Court cannot help to express that the pleadings exchanged between the parties in the present writ petition are without responsibility. The Petitioner and the Respondents, alike, have chosen to file affidavits, which are not of their own, but of their pairokars. The so-called pairokars, whether on behalf of the Petitioner or on behalf of the Respondents have not even taken the responsibility to disclose their status before this Court. The pairokars of the Petitioner and the Respondents apparently do not derive their authority on the basis of any power of attorney. Such a practice in filing affidavits or pleadings must be discouraged. Nevertheless the record is being taken as it has been presented.

6. The contention of the learned Counsel for the Petitioner that a legal representative of a partner, in reference to the context, cannot maintain an application u/s 20 of the Act contradicts the law as also what was agreed between the partners by the deed which bound them. The Act enjoins, in Section 6, that an arbitration agreement would not be discharged by the death of any party thereto either as respects the deceased or any other party but should an occasion arise be enforceable by or against the legal representative of the deceased. The provisions of Section 6 are reproduced below:

Arbitration agreement not to be discharged by death of party there to (1) An arbitration agreement shall not be discharged by the death of any party thereto, either as respects the deceased or any other party, but shall in such event be enforceable by or against the legal representative of the deceased.

(2) The authority of an arbitrator shall not be revoked by the death of any party by whom he was appointed.

(3) Nothing in this section shall affect the operation of any law by virtue of which any right of action is extinguished by the death of a person.

7. A reference to Section 6 of the Act aforesaid was brought to the notice of learned Counsel at the Bar. Counsel for the Respondents Mr. S.O.P. Agarwal, fortified the observations of the Court by citing a decision of this Court Sundarlal Haveliwala Vs. Smt. Bhagwati Devi and Others, . This decision, also lays down, that a partnership agreement containing an arbitration clause does not become redundant merely on the circumstance that one of the partners to the agreement had died. In the aforesaid decision, from the judgment it is apparent that deed of partnership does not even contain a clause that a heir of a deceased partner could have recourse to arbitration proceedings. This Court felt, in this decision, that a heir's right to arbitration survives by virtue of the stipulations contained in Section 6 of the Act, aforesaid, even the agreement between the partners

contains a specific clause to the effect, that a legal representative of a deceased partner shall have recourse to arbitration proceedings.

8. Thus the law prescribes in no uncertain terms that the fact that a person bound by an agreement which contains an arbitration clause dies, does not stand to reason that the claims arising out of such agreement cannot be sustained by the legal representative of the deceased partner. It would not be out of place to mention that Sub Clause (d) of Section 2, the definition clause, also defines a legal representative. Thus it implies that in so far as the law is concerned there is no ouster of jurisdiction in maintaining an application to lay claims on matters which arises out of the agreement, more so where the agreement stipulates that disputes between the partners would be amenable to arbitration proceedings.

9. From the record it appears that it is not denied between the parties that the agreement which bound the partnership of which Murlidhar Kanodia was a partner, was one of those deeds of partnership which did contain a clause to the effect that should there be differences between the partners, then, all such dispute and differences between the partners or between any one of them, and the legal representatives, would be sealed Under the provisions of the Act. Such an averment is contained in paragraph 9 of the counter affidavit. In the rejoinder affidavit this averment has not been denied. This is borne out from paragraph 6 of the rejoinder affidavit. Paragraph 6 of the reioidner affidavit evades a specific answer to the statement of the Respondents that the agreement between the partners contains a clause which makes a reference to the legal representatives. This, in effect, implies that a claim can be laid against a legal representative of a deceased partier and likewise can also be sustained by a legal representative, aforesaid. Thus, the affidavits on record also reveal that it had been agreed between the partners, by a solemn deed which bound them, that should there be differences between them and in the event of the death of any one of the partners a legal respresentative would be answerable and likewise would be entitled to lay a claim upon other partners also.

10. This order of the Civil Judge dated 10th August, 1976 delivered on issue No. 1 (Annexure 5 of the writ petition) is to be tested in the light of these circumstances.

Taking the facts as are admitted between the parties, the Petitioner, as opposite party No. 3, before the Civil Judge, cannot be permitted to resile from a solemnly agreed position in the event of differences between the partners, a legal representative of a partner would have the right to maintain a claim, or face a claim. The right to receive or an obligation to pay would arise upon the culmination of arbitration proceedings Consistent with the law, this stipulation between the partners in reference to the context is otherwise is not ultra vires, as the Act itself saves an agreement or an arbitration clause by stipulating that it would not stand discharged for the reason that a party to the agreement has died. Section 6 aforesaid permits a legal representative of the deceased, in reference to the context, to maintain a claim.

11. Thus, in reference to the issues in the present writ petition there is no doubt that matters between the parties are to be resolved by arbitration. The Respondents cannot be unsuited on an objection that they cannot have recourse to arbitration.

12. Mr. J.N. Tewari, learned Counsel for the Petitioner, has further contended that the application filed by the Respondents u/s 20 of the Act is beyond limitation. In view of the fact that the dispute between the parties is to be resolved by arbitration, this objection of the Petitioner (opposite party No. 3 before the Civil Judge) can also be raised before the Arbitrator, regard being had to the fact that there is merit in such an objection. In this regard it is relevant to refer two decisions of the Supreme Court *Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin and Another*, and *Renu Sagar Power Company Ltd. v. General Electric Company* 1984 SCC (4) 679. These decisions lay down the law that the question whether a dispute is arbitrable or not, that is, whether an Arbitrator has jurisdiction or not, is a matter which shall be considered by the Arbitrator himself. This implies that any issue of limitation can also be raised before the Arbitrator.

13. The Petitioner, the opposite party No. 3, would be bound by the rule of estoppel from challenging the arbitration clause in attempting to unsuit the heirs of the deceased partner Murlidhar Kanodia, in presenting their application u/s 20 of the Act and its consideration in accordance with law. The application filed by the heirs of the deceased partner Murlidhar Kanodia is valid, legal and not misconceived as it was declared and accepted by all the partners to the agreement that the legal representative or any one of them would have the status to maintain a claim. There is thus no illegality, error, either manifest or apparent, in the order dated 10th August, 1976 (Annexure 5 to the writ petition). The writ petition thus fails and is accordingly dismissed with costs.