

(2011) 09 KAR CK 0135

In the Karnataka High Court

Case No : Civil Miscellaneous Petition No. 114 of 2010

Sri. C.S. Ravishankar and Sri. S. Bhojappa

APPELLANT

Vs

Dr. C.K. Ravishankar Kalegowda and Others

RESPONDENT

Date of Decision : 05-09-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11 (6), 8, 8 (1), 8 (2)

Citation : (2011) 09 KAR CK 0135

Hon'ble Judges : Anand Byrareddy, J

Bench : Single Bench

Advocate : K.R. Krishna Murthy, for Lawyers Inc, for the Appellant; Prashanth, Advocate for Respondent Nos. 1 to 5, for the Respondent

Final Decision : Allowed

Judgement

Anand Byrareddy

1. The facts briefly stated are as follows:

The petitioners and the respondents are said to be partners of a registered partnership firm, Shivgiri Associates. It is stated that initially one H. Shivakumar and respondent no. 2 constituted the firm. The business was quarrying of granite and other minerals, as per the original deed dated 16-6-2004. The firm was re-constituted under a deed dated 20-8-2008, and the petitioners and the respondents are said to be the partners under that deed. The first respondent was said to be the managing partner. He is incidentally the husband of the second respondent. It is alleged that the first respondent along with the other respondents began to misuse the funds of the firm. The same was willfully suppressed from the petitioners and the defalcation had continued over a substantial period of time, as the petitioners had placed complete trust in him and did not suspect the same. The reality having dawned later, the petitioners had called for a meeting to confront the respondents with the circumstances and to call for verification of the true accounts. A notice in writing was issued, dated

9-6-2009.

2. The respondents had reluctantly called for a meeting on 7-7-2009 and 22-8-2009. But the petitioners were never allowed to verify the records and were only given vague replies to their queries. On the other hand it is alleged that the petitioners were compelled to sign certain blank papers. It is also alleged that the respondents threatened the petitioners that the first petitioner would be framed in a false case, if they did not co-operate. The first petitioner is said to have issued a legal notice to the respondents calling upon them to furnish accounts of the firm as per notice dated 16-7-2009. The petitioner is said to have received a reply informing him that he has been expelled from the firm, as on 21-10-2009. The second petitioner is also said to have issued a similar notice dated 23-02-2010, and on receiving a reply, had invoked the arbitration clause under the partnership deed naming an arbitrator. The respondents have not consented to the same. The first petitioner also has invoked the arbitration clause and had named an arbitrator. The respondents have not agreed on the named arbitrator but have suggested an alternative arbitrator. It is in this background that the present petition is filed seeking the appointment of an arbitrator.

3. The respondents have entered appearance and have filed statement of objections to contend that the petitioners have been relieved from the affairs of the firm during the year 2009. And that during their tenure as partners of the firm they had been privy to all the affairs and therefore there is no live dispute. The wild allegations of fraud and mismanagement would require detailed and elaborate evidence which can only be resolved by recourse to a formal suit and therefore it is contended that the petition be dismissed and that the petitioners be relegated to a civil court. Reliance is placed on the following decisions of the apex court in this regard.

1. Union of India (UOI) and Others Vs. Onkar Nath Bhalla and Sons, (Para 10)

2. Abdul Kadir Shamsuddin Bubere Vs. Madhav Prabhakar Oak, (Para 17)

3. N. Radhakrishnan Vs. Maestro Engineers and Others, (Para 20 to 26)

While the learned counsel for the petitioners places reliance on the following.

Indowind Energy Ltd. Vs. Wescare (I) Ltd. and Another,

4. The objections on the part of the respondents are not tenable. The partnership deed containing the arbitration clause is not denied. It is also not denied that when the second petitioner sought reference of the matter to arbitration, the respondents were not averse to making such a reference, but sought that it should be to one named by them. There is no indication that the firm stands duly reconstituted, though it is claimed that the petitioners are relieved from the firm.

5. The decisions sought to be relied upon by the respondents also would not advance their case. In Onkar nath Bhalla's case it was found as a fact that there

was accord and satisfaction. Therefore, it was held that there was no arbitrable dispute. Further, in the very decision it is held that while appointing an arbitrator u/s 11 of the Arbitration and Conciliation Act, 1996, two things are to be kept in view:

- a) that there exists a dispute between the parties to the agreement and that the dispute is alive;
- b) and that an arbitrator must be appointed as per the terms and conditions of the agreement and as per the need of the dispute.

In the case of *N. Radhakrishnan v. Maestro Engineers*, supra, the Apex court took note of the following peculiarities of that case, and other cases involving similar circumstances in the following words:

21. In our opinion, the contention of the respondents relating to the jurisdiction of the arbitrator to decide a dispute pertaining to a matter of this proportion should be upheld, in view of the facts and circumstances of the case. The High Court in its impugned judgment has rightly held that since the case relates to allegations of fraud and serious malpractices on the part of the respondents, such a situation can only be settled in court through furtherance of detailed evidence by either parties and such a situation can not be properly gone into by the arbitrator.

22. Reliance was placed by the learned counsel for the appellant on a decision of this court in *Hindustan Petroleum Corpn. Ltd., v. Pinkcity Midway Petroleums* wherein this court in para 14 observed: (SCC p.504g-h)

If in an agreement between the parties before the civil court, there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator. In the instant case the existence of an arbitral clause in the agreement is accepted by both the parties as also by the courts below. Therefore, in view of the mandatory language of Section 8 of the Act, the courts below ought to have referred the dispute to arbitration. The learned counsel for the appellant relying on the abovementioned observations of this Court in the aforesaid judgment submitted that the High Court was wrong in ignoring the ratio of the case and should have accordingly allowed the petition of the appellant for setting aside the order of the trial court.

23. The Learned Counsel appearing on behalf of the respondents on the other hand contended that the appellant had made serious allegations against the respondents alleging that they had manipulated the accounts and defrauded the appellant by cheating the appellant of his dues, thereby warning the respondents with serious criminal action against them for the alleged commission of criminal offences. In this connection, reliance was placed on a decision of this Court in *Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak* in which this Court under para 17 held as under:

(AIR p.411) 17. There is no doubt that where serious allegations of fraud are

made against a party and the party who is charged with fraud desires that the matter should be tried in open court, that would be a sufficient cause for the court not to order an arbitration agreement to be filed and not to make the reference. In our view and relying on the aforesaid observations of this Court in the aforesaid decision and going by the ratio of the abovementioned case, the facts of the present case do not warrant the matter to be tried and decided by the arbitrator, rather for the furtherance of justice, it should be tried in a court of law which would be more competent and have the means to decide such a complicated matter involving various questions and issues raised in the present dispute.

24. This view has been further enunciated and affirmed by this Court in *Haryana Telecom Ltd., v. Sterlite Industries (India) Ltd.* wherein this Court under para 4 observed: (SCC. p689)

4. Subsection (1) of Section 8 provides that the judicial authority before whom an action is brought in a matter, will refer the parties to arbitration the said matter in accordance with the arbitration agreement. This, however, postulates, in our opinion, that what can be referred to the arbitrator is only that dispute or matter which the arbitrator is competent or empowered to decide,

25. The learned counsel for the respondents further elaborated his contention citing the decision of the High Court of Judicature at Madras in *H.G.Oomor Sait v. O.Aslam Sait* wherein it was held: (CTC pp. 269-70).

Power of civil court to refuse to stay of suit in view of arbitration clause on existence of certain grounds available under the 1940 Act continues to be available under the 1996 Act as well and the civil court is not prevented from proceeding with the suit despite an arbitration clause if dispute involves serious questions of law or complicated questions of fact adjudication of which would depend upon detailed oral and documentary evidence.

The civil court can refuse to refer matter to arbitration if complicated question of fact or law is involved or where allegation of fraud is made.

Allegations regarding clandestine operation of business under some other name, issue of bogus bills, manipulation of accounts, carrying on similar business without consent of other partner are serious allegations of fraud, misrepresentations, etc., and therefore application for reference to arbitrator is liable to be rejected.

We are in consonance with the above referred decision made by the High Court in the matter concerned.

26. In the present dispute faced by us, the appellant had made serious allegations against the respondents alleging them to commit malpractices in the account books and manipulate the finances of the partnership firm, which, in our opinion, cannot be properly dealt with by the arbitrator. As such, the High Court was justified in dismissing the petition of the appellant to refer the matter to an

arbitrator. In this connection, it is relevant to refer to the observation made by the High Court in its impugned judgment.

The above decision squarely applies to the facts of the present case. In the present case as well there is allegation of running rival firm, interference with the smooth administration of the firm. As already stated since the suit has been filed for declaration to declare that the revision petitioner is not a partner with effect from 18.11.2005, and for consequential injunction restraining the petitioner from disturbing the smooth functioning of the first respondent firm, the issue relates to the causes which compelled the respondents to expel the revision petitioner from the partnership firm and the necessity to reconstitute the firm by entering into a fresh partnership deed. Therefore such issues involve detailed evidence which could be done only by a civil court....

That case was also dismissed for one other reason - namely non-compliance with Section 8 (2) of the Act, as noted at paragraph 29 thereof.

29. But it is to be noted herein that the claim of the appellant regarding the dispute was under the arbitration clause mentioned under the original partnership deed and not on the subsequent one. Since the original deed was not filed within the requirement of Section 8 (2) of the Act, it must be held that the mandatory requirement under the Act had not been complied with. Accordingly, even if we accept the factum of a dispute relating to the retirement of the appellant under the original deed dated 07.04.2003, still the Court would not be empowered to refer the matter to an arbitrator due to the non-compliance with the provisions mentioned u/s 8(2) of the Act.

6. However, it is also to be kept in view that mere allegations of fraud would not by itself require that the matters be relegated to the civil courts for a formal trial. This is taken note of in the earliest authority referred to by the apex court in the above decision itself, namely, in the case of Abdul Kadir Shamsuddin Bubere, as under:

17. There is no doubt that where serious allegations of fraud are made against a party and the party who is charged with fraud desires that the matter should be tried in open court, that would be a sufficient cause for the court not to order an arbitration agreement to be filed and not to make the reference. But it is not every allegation imputing some kind of dishonesty, particularly in matters of accounts, which would be enough to dispose a court to take the matter out of the forum which the parties themselves have chosen. This to our mind is clear even from the decision in Russell's case (1880) 14 Ch D 471. In that case there were allegations of contractive and actual fraud by one brother against the other and it was in those circumstances that the court made the observations to which we have referred above. Even so, the learned Master of the Rolls also observed in the course of the judgment at p. 476 as follows:

Why should it be necessarily beyond the purview of this contract to refer to an arbitrator questions of account, even when those questions do involve

misconduct amounting even to dishonesty on the part of some partner? I do not see it. I do not say that in many cases which I will come to in the second branch of the case before the Court, the Court may not, in the exercise of its discretion, refuse to interfere; but it does not appear to me to follow of necessity that this clause was not intended to apply to all questions, even including questions either imputing moral dishonesty or moral misconduct to one or other of the parties.

We are clearly of opinion that merely because some allegations have been made that accounts are not correct or that certain items are exaggerated and so on that is not enough to induce the court to refuse to make a reference to arbitration. It is only in cases of allegations of fraud of a serious nature that the court will refuse as decided in Russell's case (1880) 14 Ch D 471 to order an arbitration agreement to be filed and will not make a reference. We may in this connection refer to *Minifie v. Railway Passengers Assurance Co.*, (1881) 44 LT 552. There the question was whether certain proceedings should be stayed; and it was held that notwithstanding the fact that the issue and the evidence in support of it might bear upon the conduct of a certain person and of those who attended him and so might involve a question similar to that of fraud or no fraud, that was no ground for refusing stay. It is only when serious allegations of fraud are made which it is desirable should be tried in open court that a court would be justified in refusing to order the arbitration agreement to be filed and in refusing to make a reference.

(18) Let us therefore turn to the allegations in this case to see what their nature is. These allegations are that (i) the accounts were not made up to date, and even on demand by the respondents, the appellant did not bring them up to date; (ii) the statements of accounts which were shown by the appellant were not complete and did not appear to be correct; and (iii) the whole stock of goods was not to be found therein and the debit items appeared to be exaggerated and incorrect. These were the only allegations with respect to the accounts in the application and they do not in our opinion amount to serious allegations of fraud against the appellant which would necessitate that there should be a trial in open court. Such allegation as to the correctness or otherwise of entries in the accounts are often made in accounts suits; but they in our opinion are not such serious allegations of fraud as to induce a court to order that the arbitration agreement should not be filed and no reference should be made. Besides these allegations as to accounts the respondents also said that an injunction should be granted restraining the appellant from removing the stock so as to avoid misappropriation thereof pending the appointment of a receiver. That was not an actual allegation of misappropriation; it merely said that the respondents were afraid that there might be misappropriation in future unless an injunction was issued and a receiver appointed. Further in the affidavit in support of the application for appointment of receiver after referring to their own conclusions from the state of accounts, the respondents said that they had not received the true and complete account of the felling of the jungle, ready goods, the goods sold and the goods in balance from the appellant. They also said that they

suspected that on their conclusions from the accounts supplied to them, there might be misappropriation of the goods and of money. They further alleged that in the accounts shown to them, the sale of charcoal was shown at a rate much lower than the prevailing market rate and under these circumstances the respondents apprehended that if the work of the sale of goods remained in the hands of the appellant, the real price of the goods would not be realised. There is no allegation, however, that in actual fact the appellant had made secret profits by selling goods at a higher price and showing a lower price in the account. The respondents pointed to the entries in the account which showed the lower rate of the sale price in support of their apprehension that if the work of sale of goods remained in the hand of the appellant the real price would not in future be realised. A perusal therefore of the application under S. 20 and the affidavit filed in support of the application for appointment of receiver does not disclose any serious allegations of fraud against the appellant. What it discloses is that the respondents were not satisfied with the accounts submitted to them and were suspicious that they did not disclose the true and complete state of affairs. Such allegations, as we have already remarked are often made in account suits and if they were to be sufficient ground for not referring an account suit to arbitration on the ground of fraud, hardly any arbitration agreement in a matter in which accounting would be necessary could be referred to arbitration. That is why we emphasise that even in the leading case of *Russel* (1880) 14 Ch D 471, the learned Master of the Rolls was at pains to point out that it could not necessarily be said in a case of accounts that no reference to arbitration should be made, even though questions relating to accounts which might involve misconduct amounting even to dishonesty on the part of some partner might arise in the arbitration proceedings and even cases where moral dishonesty or moral misconduct is attributed to one party or the other might be referred to arbitration. It seems to us that every allegation tending to suggest or imply moral dishonesty or moral misconduct in the matter of keeping accounts would not amount to such serious allegation of fraud as would impel a court to refuse to order the arbitration agreement to be filed and refuse to make a reference. Looking to the allegations which have been made in this case we are of opinion that there are no such serious allegations of fraud in this case as would be sufficient for the court to say that there is sufficient cause for not referring the dispute to arbitration. This contention of the appellant must also therefore fail.

7. The allegations of fraud made in the present case on hand are vague and not relatable to any complicated fact situation. On the other hand it is a dispute pertaining to the accounts of the firm, pure and simple. The mere exaggerated allegations of the petitioners would not give it the colour of a complicated case involving profound questions of law and serious questions of fact. Therefore the ratio of the decisions referred to herein above would not advance the case of the respondents.

A more recent decision of the apex court relied on by the petitioners in the case of *Indowind Energy Limited. v. Wescare (I) Limited. & Anr.* can be said to apply to

the case on hand more aptly, wherein it is laid down as follows:

19. The scope of examination of the agreement dated 24.02.2006, by the learned Chief Justice or his Designate u/s 11(6) is necessarily to be restricted to the question whether there is an arbitration agreement between the parties: The examination cannot extend to examining the agreement to ascertain the rights and obligations regarding performance of such contract between the parties. This court in S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, and in National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., has held that when an application is filed u/s 11, the Chief Justice or his Designate is required to decide only two issues, that is whether the party making the application has approached the appropriate court and whether there is an arbitration agreement and whether the party who has applied u/s 11 of the Act, is a party to such agreement. Therefore, the Chief Justice exercising jurisdiction u/s 11 of the Act has to only consider whether there is an arbitration agreement between the petitioner and the respondent/s in the application u/s 11 of the Act. Any wider examination in such a summary proceeding will not be warranted.

In the light of the above, the petition is allowed. As the parties are unable to agree on an arbitrator, the matter is referred to Shri Justice Chandrashekariah, Former Judge, High Court of Karnataka, No. 2737, 7th A Main, 2nd Stage, Banashankari, Bangalore-560 070, as the sole arbitrator to enter upon the reference and to adjudicate on the matter in dispute.