

(2016) 02 KAR CK 0011

In the Karnataka High Court

Case No : Writ Petition No. 44751/2014 (GM-CPC) and Writ Petition Nos. 45274-75/2014

Udaya Insulated Cable Company and Others

APPELLANT

Vs

Usha Murthy

RESPONDENT

Date of Decision : 01-02-2016

Acts Referred:

Arbitration Act, 1940 — Section 24

Arbitration and Conciliation Act, 1996 — Section 8

Citation : (2016) 3 KantLJ 158

Hon'ble Judges : Budihal R.B., J.

Bench : Single Bench

Advocate : Shashi Kiran Shetty, Learned Sr. Adv. for Anuparna Basdoloj, Advocate, for the Appellant; R. Anil Kumar, Advocate for Kesvy & Co., for the Respondent

Final Decision : Dismissed

Judgement

Budihal R.B., J.—1. Heard the arguments of the learned senior counsel appearing for the writ petitioner and also the learned counsel appearing for the respondent/plaintiff, perused the grounds urged in the writ petition and also the impugned order passed by the trial court and the documents produced by the writ petitioner along with the petition.

2. The respondent/plaintiff has filed a suit for dissolution of the partnership firm, rendition of the account, realisation and distribution of the plaintiff's share from the first defendants to declare the schedule property as the assets of the partnership firm and to declare the gift deed dated 7.1.2004 is not binding and the letter of termination dated 14.2.2012 as null and void. An application was filed by the writ petitioner/defendants under Section 8 of the Arbitration Act requesting the court to refer the matter for Arbitration. As there is a clause in the partnership deed that in case of any dispute between the parties to the agreement, the matter is to be referred to the Arbitration to resolve the said

dispute. In this connection, learned senior counsel appearing for the writ petitioners draw the attention of this court to clause No. 16 in the Arbitration agreement and made the submission that this clause No. 16 in the partnership agreement clearly goes to show the dispute arising between the parties to the agreement are to be referred to the Arbitrator and accordingly an application was filed for referring the matter to the Arbitration.

3. It is also the contention of the learned Senior counsel that the trial court rejected the application only on the ground that there are complicated questions to be decided in the said suit and this can be done only by the Civil Court and not by the Arbitration proceedings.

4. The learned Senior counsel submitted that the approach of the trial court is not in accordance with law and not in the spirit of the Arbitration Act. He relied upon the decision of the Hon"ble Supreme Court rendered in Civil Appeal No. 2079/2015 arising from SLP (C) No. 20140/2014 and draw the attention of the court to para No. 2, 10, 13 and 15 of the said decision. The said paragraphs, in the said decision are relied upon by the learned Senior counsel, which reads as under:

2. Once an application is duly filed in terms of Section 8 of The Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Arbitration Act") before the civil court, what should be the approach of the court, is the short question arising for consideration in this case.

10. Once there is an agreement between the parties to refer the disputes or differences arising out of the agreement to arbitration, and in case either party, ignoring the terms of the agreement, approaches the civil court and the other party, in terms of Section 8 of the Arbitration Act, moves the court for referring the parties to arbitration before the first statement on the substance of the dispute is filed, in view of the peremptory language of Section 8 of the Arbitration Act, it is obligatory for the court to refer the parties to arbitration in terms of the agreement, as held by this Court in *P. Anand Gajapathi Raju and others v. P.V.G. Raju (Dead) and others*.

13. The attempt of the trial court and the approach made by the high court in bifurcating the cause of action, is fallacious. It would only lead to delaying and complicating the process. The said issue is also no more *res Integra*. In *Sukanya Holding (P) Limited v. Pandya and another* at paragraphs-16 and 17, it was held as follows:

"16. The next question which requires consideration is - even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act. In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action, that is to say, the subject-matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated

under the Act. If bifurcation of the subject-matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication of the subject-matter of an action brought before a judicial authority is not allowed.

17. Secondly, such bifurcation of suit in two parts, one to be decided by the Arbitral Tribunal and the other to be decided by the civil court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums".

15. Once an application in due compliance of Section 8 of the Arbitration Act is filed, the approach of the civil court should be not to see whether the court has jurisdiction. It should see whether its jurisdiction has been ousted. There is a lot of difference between the two approaches. Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statute, the civil court should first see whether there is ouster of jurisdiction in terms or compliance of the procedure under the special statute. The general law should yield to the special law-generalia specialibus non derogant. In such a situation, the approach shall not be to see whether there is still jurisdiction in the civil court under the general law. Such approaches would only delay the resolution of disputes and complicate the redressal of grievance and of course unnecessarily increase the pendency in the court.

Hence, he made the submission that in view of the principles laid down by the Hon"ble Supreme Court, the trial court ought to have referred the matter to the Arbitration and the rejection of the application is patently illegal, hence, he submitted to allow the writ petition and set aside the order passed by the trial court.

5. Per contra, learned counsel appearing for the respondent/plaintiff during the course of his arguments made the submission that, this is not the suit only for injunctory relief against a particular person, it is a suit seeking declaratory relief. Hence, learned counsel made the submission that it is the said declaratory relief sought, as against the whole world at large. The dispute in the said suit is also in respect of gift deed, which is said to have been executed in favour of defendant No. 4. Learned counsel made the submission that defendant No. 4 is not the party to the partnership agreement. So clause regarding referring the matter to the Arbitration is not at all binding on defendant No. 4 and with regard to the gift deed and the rights of the parties are also to be adjudicated in the said suit. Hence, he made the submission that the trial court took a view, in view of these things, which are not going to be adjudicated in the said suit and the matter is to be tried by a civil court itself instead of referring the matter to the Arbitration, as there are complicated questions involved in the said suit. Hence counsel submitted that the view taken by the trial court is in accordance with law and not

contrary to the provisions of the Arbitration Act. Hence, he submitted that there is no merit in the case of the writ petitioners and hence the same is to be rejected.

6. In support of his contention, learned counsel relied upon the decision of the Hon'ble Supreme Court reported in , (2003)5 Supreme Court Cases, 531 (Sukanya Holdings (P) Ltd., Vs. Jahyesh H. Pandya and Another) and draw the attention of the court to the relevant paragraphs at para-3, 14, 15, 16 and 17 and it reads as under:

3. Thereafter, Respondent 1 filed Suit No. 1991 of 2000 in the High Court of Bombay for dissolution of partnership firm and accounts and inter alia challenging the conveyance deed executed by the partnership firm in favour of M/s. West End Gymkhana Ltd. Respondent 1 also took out Notice of Motion No. 1576 of 2000 for various interim reliefs.

14. Thirdly, there is no provision as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement. As against this, under Section 24 of the Arbitration Act, 1940, some of the parties to a suit could apply that the matters in difference between them be referred to arbitration and the court may refer the same to arbitration provided that the same can be separated from the rest of the subject-matter of the suit. The section also provided that the suit would continue so far as it related to parties who have not joined in such application.

15. The relevant language used in Section 8 is "in a matter which is the subject of an arbitration agreement". The court is required to refer the parties to arbitration. Therefore, the suit should be in respect of "a matter" which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced "as to a matter" which lies outside the arbitration agreement and is also between some of the parties to the arbitration agreement, there is no question of application of Section 8. The words "a matter" indicate that the entire subject-matter of the suit should be subject to arbitration agreement.

16. The next question which requires consideration is - even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act. In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action, that is to say, the subject-matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject-matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject-matter of an action brought before a judicial authority is not allowed.

17. Secondly, such bifurcation of suit in two parts, one to be decided by the

Arbitral Tribunal and the other to be decided by the civil court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums.

7. He has also relied upon another decision of the Hon''ble Supreme Court reported in , 2011(5) SCC, 532 and the relevant paragraphs in the said decision at para-35, 36 and 37, which reads as under:

35. The Arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.

36. The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

37. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, a judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and a judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide Black''s Law Dictionary.)

8. Looking to the factual aspects involved in the case, admittedly in the said suit declaratory relief has been sought by the plaintiff with regard to the gift deed which is already in favour of defendant No. 4 said to have been executed by other defendants and it is the contention of the plaintiff in the suit, the property said to have been given under the gift deed is also the absolute property of the partnership firm. So, this aspect is to be ascertained in the proceedings that too in a declaratory decree. As it is rightly submitted by the learned counsel appearing for the respondent/plaintiff, when declaratory relief is sought by the plaintiff in the said suit, it is as against the whole world at large and not against any individual.

9. I have perused the impugned order passed by the trial court on the application I.A. No. 2 filed by the writ petitioners. The trial court in its order referred to cl. 23 of the partnership deed dated 1.5.1990. It has also referred to the decision relied upon by the counsel on both sides and ultimately, the trial court comes to the conclusion that as the matter is not only pertaining to termination, but it is also with regard to the rights to be adjudicated in respect of the gift deed also. It is also observed by the trial court that defendant No. 4 is not the party to the partnership agreement.

10. Perused the decision relied upon by the learned senior counsel, which is referred to above. In this reported decision the suit filed was a bare suit only for injunctory relief. Whereas, the case on hand, there is a relief sought seeking declaratory decree also, in respect of the gift deed and with regard to the dissolution seeking the accounts of the partnership firm are also there in the prayer column. Therefore, the decision rendered by the Hon'ble Apex court in a suit for bare injunction, cannot be said to be made applicable to the case on hand, wherein declaratory reliefs are also sought.

11. In the reported decision relied upon by the learned counsel appearing for the respondent/plaintiff reported in , (2003) 5 SCC, 531 in para-16, which reads as under:

"The next question which requires consideration is-even if there is no provision for partly referring the dispute to arbitration, whether such a course if possible under Section 8 of the Act. In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action, that is to say, the subject-matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject-matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject-matter of an action brought before a judicial authority is not allowed."

12. Therefore, looking to the principles enunciated in the said decision also and there cannot be bifurcation of the subject matter of the said suit i.e., regarding

the dissolution of the partnership firm, seeking the accounts of the firm as one part of the cause of action and so far as the declaratory relief sought in respect of the gift deed is another part of the cause of action. Under such circumstances, looking to the principles enunciated in the said decision relied upon by the learned counsel appearing for the respondent, which are referred above. I am of the opinion, the trial court has properly appreciated the matter extensively and comes to a right conclusion in rejecting the application holding that since such complicated questions are involved in the said suit, the suit has to be tried by a Civil court itself. I do not find any illegality in the said order nor is any perverse or capricious view taken by the trial court in coming to such conclusion. There are no valid and justifiable grounds for this court to interfere into the order of the trial court. Hence, there is no merit in the writ petition.

Accordingly the same is hereby rejected.