
(1984) 02 CAL CK 0026
In the Calcutta High Court
Case No : Matter No. 571 of 1982

Union of India (UOI)

APPELLANT

Vs

Bilas Singh and Co. and Another

RESPONDENT

Date of Decision : 29-02-1984

Acts Referred:

Arbitration Act, 1940 — Section 20
Civil Procedure Code, 1908 (CPC) — Order 30 Rule 2(1), 11
Partnership Act, 1932 — Section 46, 47

Citation : AIR 1984 Cal 261

Hon'ble Judges : Pratibha Bonnerjea, J

Bench : Single Bench

Advocate : K.P. Sinha and P. Sen, for the Appellant; A.C. Bhabra and D.K. Basu, for the Respondent

Judgement

Pratibha Bonnerjea, J.—The Union of India has taken out the present application u/s 33, Arbitration Act, for a declaration that the contract dated 26-11-1965 came to an end with the reconstitution of the respondent in December, 1970.

2. The history of the case is as follows:--Admittedly Bilas Singh & Co., was a partnership firm, established in June 1964 with four partners and having registration No. 39935. This 1964 firm entered into an agreement with the petitioner in writing, being contract No. 119J/KB, dated 26-11-1965 for execution of D. B. K. Railway Project on terms and conditions contained in the said contract. One of the terms thereof was:

"..... any change in the constitution of the firm shall be forthwith notified by the contractor to the Engineer."

3. Bilas Singh & Co., completed the said work in June 1968. The contract dated 26-11-1965 contained an arbitration clause. Disputes and differences having arisen out of the said contract, Bilas Singh & Co. filed a special suit in 1970 u/s 20, Arbitration Act, and obtained an award. The said award was satisfied by payment by the petitioner. On 16-4-75, Bilas Singh & Co. made additional claims

in connection with the said contract which were disputed by the petitioner. Under the circumstances, on 29-9-75 the said firm made another application u/s 20, Arbitration Act. being Special Suit No. 41 of 1975 and on the said application an order was made for reference on 7-5-76 after contest. The petitioner preferred an appeal therefrom but lost the same. The petitioner thereafter made a SLP which was dismissed by the Supreme Court. Subsequently the petitioner made an application for removal of the joint arbitrators and got a sole arbitrator appointed by Court. On 7-7-81 the petitioner again applied for removal of the sole arbitrator but failed to obtain any order. The reference, thereafter, admittedly proceeded and the petitioner took part therein. According to the petitioner, on 4-12-81 it came to know for the first time that the constitution of the firm Bilas Singh & Co. had been changed on 15-12-70 but in breach of the express term of the said contract, Bilas Singh & Co. did not inform the petitioner; about the said change.

4. In March, 1983, the petitioner took out this present application u/s 33, Arbitration Act, praying for a declaration that the contract No. 119J/KB dated 26-11-65 containing the arbitration clause came to an end with tile reconstitution of the firm Bilas Singh & Co. on 15-12-70. The change in the constitution of the firm on 15-12-70 is not denied by the respondent but it is alleged in the affidavit-in-opposition that it is the old firm who has been prosecuting the arbitration proceeding for recovery of its dues under the contract and the reconstituted firm of 1970 has nothing to do with the said claims before the arbitrator.

5. The respondent raised a preliminary objection and submitted that the point agitated in the present application by the petitioner, should be treated as barred by the principle of constructive res judicata In 1970, in respect of the disputes arising out of the said contract, 1964 firm had filed a Special Suit No. 6A of 1970. During the pendency of the said Special Suit No. 6A of 1970, the constitution of Bilas Singh & Co. was changed on 15-12-70 by retirement and introduction of partners. A deed of partnership dated 15-12-70 was also executed. The petitioner could have found out all these facts if the petitioner demanded in writing, the names and addresses of the then partners of Bites Singh & Co. in accordance with the provisions of Order 30, Rule 2 (1), Civil P. C. But that was not done. In Special Suit No. 6A of 1970, order for reference was made on 17-9-71, the reference was contested by the petitioner and the award made in the said reference was satisfied by payment by the petitioner. That order of reference dated 17-9-71 was made in favour of Bilas Singh & Co. of 1964 on the basis that the 1964 firm was entitled to enforce the contract dated 26-11-65 for realisation of its claims accrued before re-constitution. Therefore this issue raised in the present application was decided in Special Suit No. 6A of 1970 and is clearly hit by the principle of constructive res judicata On 29-9-75 Bilas Singh & Co. of 1964 again instituted a Special Suit No. 41 of 1975 in respect of other claims arising out of the contract dated 26-11-65. The petitioner could have again demanded the particulars of its partners and their, addresses under Order 30, Rule 2 (1), Civil P: C. but again that was not done. Order for reference was

made on 7-5-76. The petitioner preferred an appeal, then went up to the Supreme Court but lost at every step. Under the circumstances, the present application must be held to be hit by the principles of constructive res judicata. But the question is that the principle of res judicata can only arise if the Court deciding the issue in earlier proceeding was competent to do so. The competency of the Court is a question of jurisdiction. If, in spite of the reconstitution of Bilas Singh & Co, in December, 1970; the contract and/or the arbitration clause could survive under the law of the land, then certainly the orders dated 17-9-71 in Special Suit No. 6A of 1970 and the order dated 7-5-76 in the Special Suit No. 41 of 1975 will stand in the way and the present petition can be held to be barred by the principles of constructive res judicata. But if according to the law of the land, the contract dated 26-11-65 came to an end on 15-12-70 on reconstitution of 1964 firm as alleged by the petitioner, then it must be held that the arbitration clause contained therein also came to an end on 15-12-70. Under such circumstances the orders for reference dated 17-9-70 in Special Suit No. 6A of 1970 and the order dated 7-5-76 in Special Suit No. 41 of 1975 would be completely without jurisdiction and as such the question of res judicata constructive or otherwise will not arise. Therefore, the first thing one has to do is to find out what had happened to the contract dated 26-11-65 between the petitioner and Bilas Singh & Co. of 1964, on its reconstitution on 15-12-70.

6. The petitioner's counsel submits that reconstitution of 1964 firm on 15-12-70 completely destroyed the identity of 1964 firm. Under the circumstances, the question of survival of 1964 firm for the purpose of recovering its dues will not arise. It was not a case of dissolution of the firm so that the old firm could take steps for collection of its dues for winding up. Sections 46 and 47, Partnership Act, will not be attracted on the facts and circumstances of the present case. The petitioner relies on certain certificates of the Registrar of Firms filed in this proceeding with the leave of Court, to prove that this firm of Bilas Singh & Co. of 1964 underwent constitutional changes from time to time due to retirements and introductions of its partners. After 1964, the first change occurred on 15-12-70. The petitioner's counsel submits that in case of reconstitution of the firm under Chap. V of the Partnership Act the old firm becomes extinct and the reconstituted new firm springs up in its place. Therefore, there can be no question of survival of the old firm. Hence any contract entered into with the original firm comes to an end on its reconstitution. The petitioner's counsel, in support of his aforesaid contention, relies on *Lindlay on Partnership* Her Highness Maharani Mandalsa Devi and Others Vs. M. Ramnarain (P) Ltd. and Others, , and *Durga Prosad Sarawagi and Others Vs. Registrar of Firms and Another*, . I shall be dealing with these authorities one after another :

7. *Lindlay on Partnership*, 12th Edn., page 28 says as follows :--

"The firm is not recognised by English lawyers as distinct from the members composing, it. In taking partnership accounts, and in administering partnership assets, Courts have to some extent adopted the mercantile view and actions may

now, speaking generally, be brought by or against partners in the name of the firm, but speaking generally the firm as such has no legal recognition. The law, ignoring the firth, looks to the partners composing it; any change amongst them destroys the identity of the firm"

8. But in India the law on this point is slightly different as will be clear from the observations made by the Privy Council in AIR 1948 100 (Privy Council) cited by the petitioner's counsel :

"Before the Board, it is urged that under the Indian Partnership Act, 1932 a firm is recognised as an entity apart from the persons constituting it, and that the entity continues so long as the firm exists and continues to carry on its business. It is true that the Indian Partnership Act goes further than the English Partnership Act, 1890 in recognising that a firm may possess a personality distinct from the persons constituting it, the law in India in that respect being more in accordance with the law of Scotland than with that of England. But the fact that a firm possesses a distinct personality does not involve that the personality continues unchanged so long as the business of the firm continues."

9. Therefore the observations of Lindlay have to be tested on the basis of the law of partnership prevailing in India. In the Privy Council case, on the facts of that case it was held that the contract had come to an end with the reconstitution of the contracting firm. In that case, by an agreement dated 7-12-1907, Alembic Chemical Works Co. appointed a firm Kotibhaskar Amin & Co. as its managing agents with the stipulation that save and except in case of fraud in the management of the company by the managing agents, the managing agency agreement could not be revoked or cancelled and would continue as long as the business of the firm would continue. The contract was a continuing or an executory contract for indefinite period. In 1907, the firm had four partners, Kotibhaskar and three others. Subsequently Kotibhaskar died and the rest of the three partners assigned their respective shares in the said firm to three other persons. The last of such assignment was made on 5-10-39. On 20-11-39, Alembic Works wrote to the firm that the contract dated 7-12-1907, came to an end on 5-19-39. Thereupon, the reconstituted firm instituted a suit against Alembic Works for recovery of damages for breach of contract dated 7-12-1907. On the facts of that case, it was rightly held that the contract had come to an end. It would be noticed that the contract dated 7-12-1907 was an executory contract and could not have been enforced by the reconstituted new firm of Kotibhaskar Amin & Co. with four new partners who were all strangers to the contract dated 7-12-1907. But the facts of that case are absolutely different from the facts of the present case. Here the contract was fully executed in 1968 by the party to the contract i.e. the 1964 firm. All that remained outstanding was the right of the 1964 firm to receive the fruits of its works. The contract dated 26-11-64 was discharged by performance. There was no question of enforcing the contract against or by the new firm of Bilas Singh & Co. of 1970 as was the case before the Privy Council. Now the question is does the original firm of 1964

possess a personality distinct from its partners so as to survive after its reconstitution and is capable of enforcing its rights accrued before its reconstitution ? In short will the principles, underlying Sections 46 and 47, Partnership Act, apply on the facts of this case although in terms they are not applicable? Court's judicial conscience is bound to be severely disturbed if it has to hold that due to the change in the constitution of a firm, neither the original firm nor the reconstituted one can take steps to recover its just dues accrued before its reconstitution. No relief can be given to either of them. On the other hand, the other party to the contract, liable to pay will stand absolved from its liability and will receive an unjust benefit. If this is the legal consequence of reconstitution of a firm, it appears to be extremely inequitable and unconscionable but at the same time, one cannot overlook the fact that Chap. V of the Partnership Act dealing with reconstitution of the firm does not contain any provision similar to Sections 46 and 47 of the Act. In that view of the matter, can the principles underlying Sections 46 and 47, Partnership Act, be made applicable to a firm after its reconstitution ? The petitioner's counsel also relies on *Her Highness Maharani Mandalsa Devi and Others Vs. M. Ramnarain (P) Ltd. and Others*, to establish his contention that reconstitution destroys the identity of the original firm. In that case a suit was instituted against a firm is its, firm name. The firm had four partners one of which was a ruler, of a former Indian State. Before the institution of the suit, no consent was obtained from the Central Government u/s 87B, Civil P. C, If the suit against this firm was in fact a suit against its four partners, then the suit and decree both would have been bad in law in view of non-compliance of the provisions of Section 87B, Civil P. C. But the decree was held to be good, and binding on the partners excluding the Ruler by the Supreme Court on the ground that the firm had a limited entity. The Supreme Court came to that legal conclusion by approving AIR 1948 100 (Privy Council) and held in para 4 of that report :--

"For some purposes the law has extended limited personality to a firm."

10. At the same time, the Supreme Court gave a warning "..... but the legal fiction must not be carried away too far". In the present, case, I have to consider whether this legal fiction can be extended further and it can be held that the original firm, although reconstituted, still "retains its identity and is capable of suing or taking steps for realisation of its dues accrued before its reconstitution.

11. Dissolution and constitution of a partnership are two different legal concepts. Dissolution puts an end to the partnership, but reconstitution keeps it subsisting, though in another form. A dissolution followed by some of the erstwhile partners taking over the assets and liabilities of the dissolved partnership and forming themselves into a partnership is not reconstitution of the original partnership. The partnership formed after dissolution is a new partnership and not a reconstitution of the old partnership. A reconstitution of a firm denotes a structural alteration of the membership of the firm, by addition or reduction of members and an incidental redistribution of the shares of the partners. Whatever

may be the method by which a new firm comes into existence whether by fresh agreement after dissolution of the old firm or by structural changes on reconstitution of a firm the net result is that a new firm springs up in existence which is different from the old one and has a separate identity. Therefore the concept of an old firm and a new firm is very much in existence even in case of a re-constitution of the firm. If so, why the old firm should not be held to have a limited entity and be able to recover its just dues ? In this connection some guideline may be obtained from a case decided under Income Tax Act, 1964. In Commissioner of Income Tax Vs. Shiv Shanker Lal Ram Nath, , the facts were as follows :--

The firm originally consisted of seven partners. The accounting year used to be ended on Dashera of each year with effect from April, 1961. Thereafter two partners retired, two others were admitted as new partners and two minors were admitted to the benefit of the partnership. For the assessment year. 1962-63, the assessee--the new firm adopted the financial year as its accounting year and filed two returns, one in respect of the income of the old firm for the period from 30-9-1960 to 31-3-61 and the other, in respect of the new firm for the period from 1-4-61 to 31-3-62. The Income Tax Officer had held that there was merely a change in the constitution of the old firm and the assessee could not change its accounting year without the permission of the Income Tax Officer and assessed the entire income for the period from September, 1960 to March, 1962. The Appellate Tribunal reversed the order. On reference, the decision of the Tribunal was confirmed by the Allahabad High Court holding :

"In case, where a firm is reconstituted, the old firm ceases to exist. Section 187, even by implication, does not create a fiction that the income derived by the old firm becomes income of the reconstituted firm. But, the section makes the new firm liable, to be assessed in respect of the income derived by the old firm. The Tribunal was, therefore, right in holding that notwithstanding the Provisions of Section 187 of the Act, the firm, after it underwent a change in its constitution on April 1, 1961, became an assessable entity which, for the purposes of assessment was distinct from the firm as it stood prior to April 1, 1961, and that the income derived by the old firm had to be assessed in the hands of the new firm separately and without clubbing it with the income derived by it during the relevant accounting year. The new firm could not be compelled to elect the previous year which had been elected by the old firm. Accordingly no question of the assessee changing its previous year without obtaining the consent of the Income Tax Officer arises."

12. It is clear that the old firm, although treated as extinct for the purpose of being an assessee, its liability to pay the Income Tax for the period prior to its reconstitution remained alive in the eye of law. If its liability to pay remains alive then why not its right to recover its dues? Can it be said that its liability can be enforced by process of law but not its rights ? In case of death of a natural person, his estate in the hands of his heirs remains liable for his liabilities

accrued during his lifetime. His heirs can also enforce his rights accrued during the lifetime of the deceased. What will happen in case of a reconstituted firm ? The reconstituted firm will pay the tax of the old firm but will not be entitled to recover its dues. This position is anomalous, inequitable and unjust. In my opinion, for the ends of justice, the legal fiction of limited entity or separate personality of a firm and/or the principles underlying Sections 46 and 47 of the Act should be extended in these cases also and it should be held that in spite of reconstitution, the original firm can sue in firm name for recovery of its claims accrued before its reconstitution. Similarly the original firm may be sued in the firm name in respect of its liabilities which accrued prior to change in its constitution. I do not find any reason or justification for not extending the legal fiction in this case. As a matter of fact this fiction has been applied in *Her Highness Maharani Mandalsa Devi and Others Vs. M. Ramnarain (P) Ltd. and Others*, and other cases as well. It may be said that all these difficulties could have been avoided if the partners of the original firm would have assigned their respective right, title and interest in the firm to the reconstituted firm. But that would be a different matter altogether. We are concerned with the legal position as to what will happen to a firm in absence of such an assignment. In my view, the original firm can sue and be sued in its firm name in respect of causes of action which arose prior to its reconstitution. This view finds support in AIR 1937 Nag 314 cited by the respondent. In this case, the firm originally consisted of three partners. One of them became insolvent. This suit was instituted on 29-7-32 before the Partnership Act came into force on 1-10-32. Prior to this Act, insolvency of a partner did not dissolve the firm. The defendant in that case, however, took the plea that the firm had been dissolved and that the remaining partners did not have any right or authority to sue. It was also argued by the defendant that the firm could sue in firm name under Order 30, Rule 1, C. P. C., only while it was alive and carrying on business. This argument was negatived and the suit was held to be good on the ground that there was no dissolution of the firm by reason of insolvency. If there was no dissolution then what was the effect on the firm of the insolvency of one of its partners ? The insolvent partner had gone out of the firm but the partnership had continued with rest of the two partners. It was a clear case of structural change in the partnership. Still it was held that the firm could file the suit in the firm name for recovery of its dues. Ram Bilas Ojha was the managing partner, of 1964 firm of Bilas Singh & Co. and he had the authority to act for the firm. This Ram Bilas Ojha, representing Bilas Singh & Co. of 1964 had been prosecuting the arbitration proceedings in the firm name for recovery of its claims which arose before its reconstitution and had obtained two orders dated 17-9-71 in Special Suit No. 6A of 1970 and the order dated 7-5-75 in Special Suit No. 41 of 1975. I find these orders are perfectly valid.

13. In the present application, the petitioner has prayed for a declaration that the contract dated 26-11-65 came to an end with the reconstitution of the firm of Bilas Singh & Co. on 15-12-70. But in this case the contract had already come, to

an end and/or discharged in 1968 by complete performance of the same. What survived was the arbitration clause for adjudication of the respective rights and obligation of the parties arising out of performance of the said contract. Hence the question of the contract coming to an end on 15-12-70 did not arise.

14. In view of my aforesaid findings, I also hold that the present application is barred by the principle of constructive res judicata. Assuming that Bilas Singh & Co. of 1964, did not inform the petitioner about its constitutional change in 1970 in breach of the express term of the agreement, still the petitioner had two opportunities to know the correct position if it had availed of its legal rights under Order 30, Rule 2 (1), Civil P. C. Therefore, the petitioner had full opportunity to agitate the point now raised by the petitioner, in the Special Suit No. 6A of 1970 and Special Suit No. 41 of 1975. This point should have been agitated in those two cases.

15. The petitioner's counsel then cited 69 CWN 889, In this case, the question was whether Article 106 of the old Limitation Act would apply. On construction of the deed alleged by the plaintiff to be the deed of dissolution of the firm, the Court held that there was no dissolution and it was a case of reconstitution. Hence Article 106, Limitation Act which applies to a dissolved firm would not apply. Relying on this case the petitioner's counsel argued that in India the principles of winding up of the dissolved firm cannot be imported in the case of reconstitution of the firm. I do not think (1965) 69 CWN 889 had laid down that legal proposition. The Court was concerned in that case, with the application of Article 106 of the old Limitation Act. The petitioner's counsel further submits that there cannot be two firms by the name of Bilas Singh & Co. -- one old and one new. Existence of two firms bearing same names is a legal impossibility. He cited Durga Prosad Sarawagi and Others Vs. Registrar of Firms and Another, in support of his contention. It was argued in that case that there was a registered firm and several other unregistered firms, all bearing the same name were in existence at the same time. The proceeding in Durga Prosad Sarawagi and Others Vs. Registrar of Firms and Another, was a writ petition under Article 226 of the Constitution. It was observed by the Court as follows :--

"Were we to decide the question of fact We could decide against Mr. Ginwalla's client but it is not necessary for us to go into the disputed question of fact in this appeal as we are satisfied that the impugned order cannot stand on the ground already stated."

16. Therefore the question whether there could be two or more firms bearing the same name, same goodwill or same business remained undecided in Durga Prosad Sarawagi and Others Vs. Registrar of Firms and Another, . This case is not helping the petitioner.

17. The petitioner's counsel further, submits that the respondent had practised fraud upon the Court and the petitioner by suppressing the factum of reconstitution of the firm Bilas Singh & Co. In para 1 (ix) of the petition, the

petitioner alleged that it came to know about the reconstitution of the firm for the first time on 4-12-81 when it wanted to know the authority of the respondent to prosecute the claims before the arbitrator. This allegation has been specifically denied by the respondent in para 11 of the affidavit-in-opposition filed in this proceeding. If the respondent had any intention to suppress this fact, it would not disclose this fact for the mere asking by the petitioner. Moreover, if the petitioner on 4-12-81 had discovered this fraud, the petitioner would have immediately moved the Court for setting aside or recalling the order of reference dated 7-5-76 on the ground of fraud. But what was the reaction of the petitioner on discovery of alleged fraud on 4-12-81 ? The petitioner admittedly attended two sittings of the arbitrator on 28-12-81 and 29-12-81 and on 8-6-82, took out an application for revocation of the authority of the arbitrator which was withdrawn by the petitioner on 25-2-83 with leave to take out a fresh application on the same cause of action. The present application was taken out on 15-2-83, after more than one and half years from the date of discovery of the alleged fraud. I have no doubt in my mind that the petitioner, in its desperate attempt to get out of the order of reference dated 7-5-76, has set up the allegation of fraud to prejudice the Court against the respondent. The allegation of fraud is an afterthought. It is true that under the agreement, it was the duty of the respondent to inform the petitioner about the change in its constitution. By not complying with the said term, the respondent might have committed breach of contract for which the petitioner could have claimed damages. But there can be no question of fraud as alleged by the petitioner on the facts and circumstances of this case. I have already held that the petitioner had two previous opportunities to discover this fact of change in the constitution of Bilas Singh & Co. while contesting Special Suit No. 6A of 1970 and Special Suit No. 41 of 1975.

18. The last point taken by the petitioner's counsel is the question of jurisdiction. The petitioner's counsel submits : On 12-12-74, the respondent had taken out an application under Sections 8(1)(b), 20(4) and (5) and 41-A, Arbitration Act, read with Section 151, Civil P. C., for enlarging the scope of the reference then pending before the arbitrator on the basis of a letter dated 10-10-74. Subsequently the respondent withdrew the said application, on 10-4-75 with liberty to make a fresh application. According to the petitioner that order, dated 10-4-75 was null and void. Therefore the second application u/s 20, Arbitration Act taken out by the petitioner on the basis of the same letter dated 10-10-74 was not maintainable and the order of reference dated 7-5-76 was without jurisdiction. The petitioner's counsel had made long submission on this point and cited quite a number of case laws. If this was the contention of the petitioner, then the petitioner ought to have preferred an appeal from those orders but it did not do so. This point ought to have been taken by the petitioner when the Special Suit No. 41 of 1975 was heard. The petitioner preferred appeal and thereafter went up to the Supreme Court from the order dated 7-5-76 passed on the Special Suit No. 41 of 1975 but lost at every stage. This point is, therefore, hit by the principle of constructive res judicata. It is now too late in the day to

agitate this question in the present application. Moreover in the present application u/s 33 of the Act I am concerned with the existence and validity of the arbitration agreement only. I have nothing to do with the orders dated 10-4-75 or 7-5-76. But still the petitioner has brought all these extraneous materials in this petition obviously with the intention to create prejudice against the respondent.

19. I have already held that the legal fiction of limited entity of a firm as embodied in Sections 46 and 47, Partnership Act, also applies to the original firm in spite of its reconstitution. This principle has been applied and extended in very many cases mentioned above. In that view of the matter, I hold that the present application is without any merit and is dismissed with cost. In view of my judgment, the time to make award by the arbitrator is extended for 3 months from date. Stay for 4 weeks as prayed by the petitioner. On expiry of 4 weeks, the stay order will stand vacated.