

Vittala Nelli Vs. Gopalakrishna Nelli

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Court : Karnataka

Decided On : Jun-03-1992

Reported in : ILR1992KAR2768

Judge : Krishnan, J.

Acts : [Arbitration Act, 1940](#) - Sections 34; ;Code of Civil Procedure (CPC) - Order 39, Rules 1 and 2

Appeal No. : C.R.P. No. 6464 of 1990

Appellant : Vittala Nelli

Respondent : Gopalakrishna Nelli

Advocate for Def. : Udaya Holla, Adv.

Advocate for Pet/Ap. : B.V. Acharya, Adv. for ;H.G. Ramesh, Adv.

Judgement :
ORDER

Krishnan, J.

1. The Revision petitioner is the defendant in O.S. 729 of 1989 on the file of Munsiff, Shimoga and being aggrieved by the dismissal of his application for stay of the suit under Section 34 of the Arbitration Act (for short 'the Act') by the learned

Munsiff and also dismissal of the appeal preferred by him against that order by the learned Civil Judge, has preferred this Revision Petition.

2. For the sake of convenience, I shall refer to the parties by virtue of their ranks before the trial Court.

3. The plaintiff who is no other than the brother of the defendant filed the suit seeking for a declaration that there is no partnership between him and the defendant, in respect of Nelli Prakash Lodging and for permanent injunction restraining the defendant from dealing with 36 rooms of his (plaintiff's) share and also for recovery of damages of Rs. 42,000/- for a period of 7 months from 15-11-86 to 15-6-87. The case put forward by him in brief is as follows:

The building in which Hotel Manohara Cafe and Nelli Prakash Lodging exist in Nehru Road, Shimoga, belonged to his father Janardhana Nelli who made a settlement in respect of the suit property on 13-10-80 and divided the building into two portions and northern portion was given to the plaintiff and southern portion was given to the defendant. 36 rooms in the 1st and 2nd floor came to the share of the plaintiff and 24 rooms in the said floors came to the share of the defendant. To facilitate the running of the Hotel Manohara Cafe, the defendant leased his portion of the ground floor to him under lease deed dated 25-3-81 for a period of 5 years and after the expiry of the said period, it was extended for another period of 5 years, viz., till 25-3-91. With reference to the lodging rooms situated in the 1st and 2nd floor, plaintiff and defendant entered into a partnership to run the lodging business and defendant was the person in charge of the partnership business and the said partnership was at will. In the year 1986 as differences arose between the parties, plaintiff issued notice dissolving the partnership, but the defendant had sent an untenable reply and therefore, he has been obliged to file this suit seeking for the relief of declaration and injunction referred to above.

4. The suit was filed in the first instance in the Court of Principal Civil Judge, Shimoga, and it was registered as O.S. 155/87. When this suit was taken up after registration of the same on 4-7-87, Sri K.M.S. who had entered caveat on behalf of the defendant took notice and sought for time to file vakalath and objections to I.A. Consequently, the case was adjourned to 18-7-87. On that date Sri K.M.S. filed

power for the defendant and he also filed a Memo that he intended to file an application for stay of further proceedings in the case under Section 34 of the Arbitration Act and sought for adjournment of the case to file the said application. The case was adjourned to 31-7-87 and on that date the Advocate for the defendant filed I.A.II under Section 34 of the Arbitration Act. This application of the defendant was opposed by the plaintiff and at that stage on account of the enhancement of the pecuniary jurisdiction of the Munsiff, the case came to be transferred to the file of Munsiff, Shimoga and registered as O.S. 729 of 1989. The learned Munsiff after hearing both the sides dismissed I.A.II by his order dated 26-3-90, The defendant aggrieved by this order of the learned Munsiff preferred MA 31/1990 and as the said appeal also came to be dismissed he has preferred the present Revision Petition,

5. Before advertng to the several contentions advanced in this Revision Petition, it may be noticed that the defendant in the course of the affidavit filed in support of I.A.II has asserted that the partnership entered into between him and the plaintiff had not come to an end and it could not be dissolved during the period of continuance of lease period of Manohara Cafe Hotel and as per Clause 14 of the Partnership Deed, the dispute between the parties has to be referred to arbitration and he is always ready and willing to get the differences resolved through arbitration. Even in the course of the plaint itself, it has been stated that the defendant had taken up the contention in the reply notice that the partnership also continued when the lease was renewed and that the dissolution of the firm by issue of notice was untenable.

6. The learned Munsiff dismissed I.A.II for more than one reason. One of the reasons mentioned is that on 18-7-87 the defendant did not file the application under Section 34 of the Act and subsequently though he filed an application under Section 34 of the Act on 31-7-87, the case was adjourned on the ground that negotiations for settlement were going on and following the Decision of this Court reported in MANJUNATH V. JANNU v. MRS. LATHA M. RAIKAR : ILR 1989 KAR2078 it was held that the conduct of the defendant amounted to giving up his right to have the dispute settled in accordance with the Arbitration Agreement. Secondly, it was held by the learned Munsiff that admittedly the partnership was at

will and the partnership business had come to an end and the relief sought for in the suit related to the period subsequent to 15-11-86, on which date the partnership had come to an end and hence the relief prayed for in the suit did not relate to the partnership business within the meaning of Clause 14 of the Partnership Deed. Thirdly, it was held that the questions that arise for consideration in the suit involve complicated questions of law and fact and therefore, it was more appropriate that the said questions should be resolved in the Court rather than by arbitration and therefore, this was not a fit case to exercise discretion in favour of the defendant.

7. The learned Civil Judge held that the defendant had taken over other steps within the meaning of Section 34 of the said Act and relying upon the Decision of this Court adverted to already, held that the defendant was precluded from claiming the benefit under the said Section. Secondly, it was also held that the grant of stay under the said Section was discretionary and the learned Munsiff for valid reasons had refused to exercise discretion in favour of the defendant and therefore, it was not a fit case for him to interfere with the said discretion.

8. The learned Advocate for the Revision petitioner contended that both the lower Courts have proceeded to exercise jurisdiction on erroneous view of the law contrary to the Decision of the Supreme Court and therefore, the orders of the two Courts below deserve to be set aside. It was secondly urged that despite the fact that his client has disputed that the partnership continued to be at will and also the further case of the plaintiff that there existed no partnership subsequent to 15-11-86, the learned Munsiff has proceeded on the wrong assumption that the fact that the partnership was at will was admitted and therefore, the other grounds on which the learned Munsiff has refused to exercise discretion in favour of his client are clouded on account of this wrong assumption on a disputed fact and also the approach contrary to the Decision of the Supreme Court and, therefore, the orders are liable to be set aside. It was also urged that there are valid grounds to grant the prayer made under Section 34 of the said Act which of course have been contested by the learned Advocate for the plaintiff.

9. Section 34 of the said Act reads as hereunder:

'Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings.'

A mere look at the Section itself indicates that the application under this Section has to be filed by the party seeking stay of the proceedings before filing the written statement or taking any other steps in the proceedings. It has no doubt been held by a Division Bench of this Court in the Decision reported in : ILR 1989 KAR2078 that the voluntary appearance of the defendant in the suit and his prayer for time to file objections to the application filed by the plaintiff for order of temporary injunction amounted to taking any other steps in the suit for the progress of the suit and therefore, that defendant was disentitled for an order of stay of the proceedings under Section 34 of the Act. It was urged on behalf of the Revision petitioner that this Decision is completely opposed to the law declared by the Supreme Court in the Decision reported in FOOD CORPORATION OF INDIA AND ANR. v. YADAV ENGINEER AND CONTRACTOR AIR 1982 SC 1302 and it was a Decision earlier in point of time to the Decision of this Court and therefore, this Decision is per incuriam and cannot in any way be put to use to negative the relief prayed for by the defendant. The Supreme Court in this Decision has held that the general words 'any other steps' used in the said Section are controlled by the specific words 'written statement' used earlier by application of the principle of ejusdem generis and has held as hereunder:

'That, some other step must indisputably be such step as would manifestly display an unequivocal intention to proceed with the suit and to give up the right to have the matter disposed of by arbitration. Each and every step taken in the

proceedings cannot come in the way of the party seeking to enforce the arbitration agreement by obtaining stay of proceedings but the step taken by the party must be such step as would clearly and unmistakably indicate an intention on the part of such party to give up the benefit of arbitration agreement and to acquiesce in the proceedings commenced against the party and to get the dispute resolved by the Court. A step taken in the suit which would disentitle the party from obtaining stay of proceeding must be such step as would display an unequivocal intention to proceed with the suit and to abandon the benefit of the arbitration agreement or the right to get the dispute resolved by arbitration.'

It has also been observed with reference to the interlocutory proceedings and contesting the said proceedings as hereunder:

'When these interlocutory proceedings are contested it cannot be said that the party contesting such proceedings has displayed an unequivocal intention to waive the benefit of the arbitration agreement or that it had submitted to the jurisdiction of the Court. When ex parte orders are made at the back of the party the other party is forced to come to the Court to vindicate its right. Such compulsion cannot disclose an unambiguous intention to give up the benefit of the arbitration agreement. Therefore, taking any other steps in the proceedings must be confined to taking steps in the proceedings for resolution of the substantial disputes in the suit. Appearing and contesting the interlocutory applications by seeking either vacation thereof or modification thereof cannot be said to be displaying an unambiguous intention to acquiesce in the suit and to waive the benefit of the arbitration agreement. Any other view would both be harsh and inequitable and contrary to the underlying intent of the Act.'

Their Lordships of the Supreme Court have adverted to the clear cut cleavage and division of opinion amongst various High Courts and have pointed out that their view referred to above was in consonance with that taken by the High Courts in Gujarath, Madhya Pradesh and Rajasthan and also later Decisions of the Calcutta High Court. Having held so the Decisions taking the contrary view reported in SUBAL CHANDRA BHUR'S Case : AIR1943 Cal484 ; AMRITLAL KOTHARI v. GOLECHA FINANCIERS : AIR1966 Cal315 ; P. GANNU RAO v. P. THIAGARAJA

RAO AIR 1949 Madras 582; BORLES S.A. v. ASTROUIC COMPANIA NAVIORS S.A. : AIR1970 Mad323 and S. RAMALINGAM CHETTIAR v. SARVESWARAN : AIR1977 Mad189 have been overruled in this Decision, in that Their Lordships have held in para 26 as hereunder;

'Therefore, with respect, the decisions taking the contrary view do not commend to us.'

It is rather unfortunate that these Decisions of the Calcutta and Madras High Courts which have been overruled by the Supreme Court were cited before this Court without bringing to the notice of the Court that they had been overruled, and the fact that they had been overruled was not even brought to the notice of the Court by the other Advocate even. Be that as it may, the fact remains that the Decision of the Division Bench referred to above runs completely contra to the Decision of the Supreme Court which is binding as provided by Article 141 of the Constitution. This Decision of the Supreme Court has been followed in a later Decision reported in SADHU SINGH GHUMAN v. FOOD CORPORATION OF INDIA AND ORS. : [1990]1SCR353 and it has been observed as hereunder at page 894:

'It may be noted that the expression 'a step in the proceeding' which would disentitle the defendant from invoking Section 34 of the Arbitration Act is not every step taken by him in the suit. It should be a step to abandon the right to have the suit stayed. It should be a step in aid of the progress of the suit. The step must have been consciously taken with a view to submit to the jurisdiction of the Court for the purpose of adjudicating the controversy on the merits'.

In view of both the earlier and later Decisions of the Supreme Court adverted to above, it could not be contended on behalf of the plaintiff that still the Division Bench Decision of this Court should hold the field. Therefore, it has to be held that the said Decision stands overruled by implication by this later Decision of the Supreme Court.

10. In the background of the law enunciated by the Supreme Court in relation to the meaning to be given in the words 'taking any other steps in the proceedings'

occurring in Section 34 of the Act, we could examine the facts of the present case to find out whether any intention on the part of the defendant to proceed with the suit and to abandon the benefit of the arbitration agreement, or the right to get the dispute resolved by arbitration manifests by the steps taken by the defendant. As already noticed records of the trial Court disclose that the plaint was presented on 3-7-87 along with I.A.I, an Application for grant of injunction under Order 39 Rules 1 & 2 CPC. The order sheet with reference to the registration of the suit is dated 4-7-87 and that date's order sheet reads as hereunder:

'Register the suit. Sri. K.M.S. takes notice and prays time to file vakalath and objections to I.A. Call on 18-7-87.'

The order sheet dated 18-7-87 reads as hereunder:

'Sri K.M.S. Advocate files power for defendant, Sri. K.M.S. Advocate files a memo stating he wants to file an application. Call on 31-7-87.'

In the Memo it has been specifically mentioned that the application which he proposed to file was one under Section 34 of the Act. On the said date, application under Section 34 of the Act has been filed. Reference has already been made to the Memo filed on 18-7-87. If even contesting the Interlocutory Application filed for grant of injunction, as was the case in the Decision reported in AIR 1982 SC 1302 does not bar the defendant from seeking relief under Sections 34 of the Act, by no stretch of imagination could it be said that the prayer made for time on 4-7-87 to file vakalath and objections to I.A. as any manifest intention on the part of the defendant to abandon his right to get the dispute resolved by arbitration.

11. The learned Munsiff has also adverted to the prayer made on behalf of the defendant on 30-11-87 and 30-1-88 that the matter was likely to be compromised and it has been pointed out that this conduct on the part of the defendant also amounted to giving up his right to have the dispute settled in accordance with the arbitration agreement. In the first instance it may be noticed that Section 34 of the Act refers to the application to be made by the party to the arbitration agreement invoking the stay of the proceedings before filing the written statement or taking any other steps in the proceedings. It does not refer to the subsequent stage.

Even otherwise, it may be noticed that if an Advocate who has applied for stay of the suit under Section 34 of the Act seeks for time on the ground that the matter is likely to be settled, it is impossible to draw any kind of inference against the party who has made such a prayer. With such a conduct his intention that he wants to abandon the right available to him under the arbitration clause is in no way manifested. It may be noticed that even in this Court on a number of dates the adjournment was sought for by both the parties that they would find out whether the matter could be settled between the parties out of Court. That does not mean that the defendant wants to submit to the jurisdiction of the Court and does not want to avail the benefit of getting the dispute resolved by reference to arbitration. Therefore, this ground on which the learned Munsiff has negated the prayer of the defendant cannot at all be sustained.

12. Whether the partnership has ceased to exist on account of the notice issued by the plaintiff or whether it continues and whether the defendant dealing with 36 rooms of the plaintiff's share in his capacity as managing partner of the partnership is a matter which is not admitted and is a matter which has to be decided in the suit, if the matter is not referred to the arbitration. When that is so, as to how the learned Munsiff has gone on making reference in the course of his order that admittedly it was a partnership at will and that the partnership had been dissolved and whether the defendant had or had no right after dissolution to make use of the 36 rooms, cannot at all be understood. In fact no argument was advanced on behalf of the defendant to sustain these findings of the learned Munsiff except for contending that they must be only the prima facie conclusions of the learned Munsiff.

13. It was contended on behalf of the defendant that only if there is an error of jurisdiction could this Court interfere with the order of the trial Court in exercise of the powers under Section 115 CPC and after all both the Courts have followed the Division Bench Decision of this Court and hence no interference is called for. It has already been pointed out that the Division Bench Decision of this Court runs contra to the Decision of the Supreme Court and therefore, if the Supreme Court Decision is ignored, this Court had a duty to interfere with the said order and further the matter also relates to the jurisdiction of the Court because if the

contention of the defendant is upheld, it ousts the jurisdiction of the Civil Court and even with reference to the aspect whether the matter deserves to be stayed or not, several grounds were urged by both the learned Advocates and it appears to me that it is quite unnecessary to refer to all those contentions in the view which I propose to take.

14. As already pointed out, the approach made by the two Courts below with reference to the proceedings that have taken place prior to the filing of the application under Section 34 of the Act as manifesting the intention of the defendant to abandon his right to get the dispute settled by arbitration and as amounting to submission to the jurisdiction of the Civil Court is directly opposed to the principle enunciated by the Supreme Court and further the learned Munsiff has wrongly assumed that the fact that the partnership was at will and it stood dissolved by issue of notice by the plaintiff was an undisputed fact, whereas they are the very facts that the defendant proposes to dispute. With this wrong approach in law and wrong assumption of fact when the learned Munsiff has proceeded to deal with the other aspects relating to exercise of discretion in favour of the defendant, it cannot be said at this stage as to how far these aspects have clouded the very approach made by the learned Munsiff in proceeding to find out whether this was a fit case to exercise discretion in favour of the defendant or not. When that is so and when the learned Civil Judge has also not adverted to the aspect of exercise of discretion independent of this wrong approach made by the learned Munsiff, it appears to me that this Court cannot substitute its discretion in the place of the one exercised by the two Courts below and on the other hand, the orders passed by the two Courts below should be set aside and the case should be remitted back to the trial Court with a direction to dispose of the application according to law, in the light of the several aspects pointed out in the course of this order. Therefore, I have stated that it is not necessary to advert to all other contentions urged on behalf of both the parties for exercise of discretion one way or the other.

15. In the result, the orders of the two Courts below are set aside and the case is remitted back to the file of the learned Munsiff for disposal of I.A.II in accordance with law in the light of the observations made above. In the circumstances, the

parties are directed to bear their own costs in this Court.

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