

Prem Kumar Vs. Harbans Singh

Prem Kumar Vs. Harbans Singh

SooperKanoon Citation : sooperkanoon.com/685921

Court : Delhi

Decided On : Apr-22-1981

Reported in : 20(1981)DLT273; 1981RLR652

Judge : M.L. Jain, J.

Acts : [Arbitration Act, 1940](#) - Sections 34

Appeal No. : First Appeal No. 255 of 1980

Appellant : Prem Kumar

Respondent : Harbans Singh

Advocate for Pet/Ap. : A.K. Tandon and; K.P. Kapoor, Advs

Judgement :

M.L. Jain, J.

(1) Respondent Harbans Singh and appellant Prem Kumar formed a partnership on September 26, 1978 to run 'Rocket Circus' with its registered office at Karol Bagh, New Delhi. The initial investment of Rs. 60,000.00 was to be made in equal shares by each of the partners. Prem Kumar was responsible for running the business and maintain the accounts. The partnership was at will determinable by three months' notice on either side. The respondent invested in all Rs. 45,000/, while the appellant did not contribute anything towards the capital. The circus gave

performances in Himachal Pradesh and Punjab, but the accounts received by the respondent showed a deficit of Rs. 34,000.00 . The respondent visited the circus at Nonik in Punjab, and discovered that a galary worth Rs. 20,000.00 was missing and the accounts were irregularly maintained. He served a telegraphic notice on the appellatant on June 25, 1979 stating that the partnership stands dissolved with immediate effect, that no more business is to be transacted and that the matter will be referred to the arbitration of Shri M.S. Vallia. He received no response. Then he filed the present suit in the court of the Senior Sub-Judge under section 44 of the Partnership Act. He prayed that the firm be dissolved and accounts be taken. He complained that the defendant has misappropriated the funds, was making false accounts, the business of the firm can not be carried on same at a loss and it is otherwise just and equitable that the firm be dissolved.

(2) The court appears to have appointed a commissioner who prepared an inventory on July '2.2, 1979. On September li, 1979, the plaintiff moved an application for return of the plaint. It was allowed. The plaint was then presented to the District Judge on November 6, 1979. On November 7, 1979 the plaintiff moved an application for appointment of a receiver.

(3) On November 7, 1979, the defendant moved an application under section 34 of the Arbitration Act that the partnership deed clause 13- contains an agreement of arbitration, that the defendant was ready and willing to arbitration, that the circus had already stopped performing on account of loss, on October 10,1979, that the suit be stayed and that the matter be referred to arbitration. In reply, the plaintiff respondent stated on November 17, 1979 that the suit should not be stayed because it was a case of extreme hardship. I he defendant had defrauded him, swindled and misappropriated large amounts and burdened the plaintiff with heavy losses. He has not specified the dispute which may be referred to arbitration and has participated in the proceedings. He prayed that the application be dismissed.

(4) On November 17,1979 the defendant also filed a reply to the application for appointment of a receiver. On November 29,1979, evidence of both the parties was recorded on the application under section 34 of the Arbitration Act. On December 18, 1979, the application for amendment of the plaint was made. The

amendment was allowed on January 7, 1980. Revision in the High Court was rejected on January 30, 1980.

(5) On January 23, 1980, the defendant moved an application for rejection of the plaint for deficient court fee and also challenged the jurisdiction. This application was rejected on March 10, 1980.

(6) On May 29, 1980 defendant's application under section 34 of the Arbitration Act was rejected. The present appeal against that order was filed on July 25, 1980.

(7) On July 17, 1980, the defendant filed his written statement.

(8) The learned Additional District Judge by his order, dated May 29, 1980 while rejecting the application for stay of the suit, held that serious allegations of misappropriation have been made against the defendant, which the arbitrator will not be able to decide. He further held that the application made by the defendant does not specify the dispute or difference existing between the parties which should be referred to arbitration. The claim of the plaintiff for dissolution of partnership and rendition of accounts is not a dispute covered by the arbitration clause. Moreover, the defendant has participated in the proceedings (1) by moving a revision petition against the order of January 7, 1980 allowing amendment of the plaint and (2) the defendant had moved an application on January 23, 1980 (January 24, 1980) praying for rejection of the plaint due to insufficient stamp and has also prayed that the court had no jurisdiction to hear the case on the said plaint. This application was rejected on March 10, 1980. The defendant moved another application on April 7, 1980 for review of the said order. But that was not pressed and dismissed on May 23, 1980. These were steps taken which disentitled the defendant to any stay of the proceedings.

(9) Clause 13 of the partnership deed reads as under:--

'THAT in case of any disputes or differences touching any clause of this partnership deed or regarding the implementation or working of the business of the partnership, the same shall only be settled by Arbitration as provided in the

Arbitration Act.'

The controversy, that has arisen at the very commencement of this case is whether the appellant has been able to show any dispute for reference to arbitration under this clause. According to *M/s. Paul Hosiery Mills v. Union of India and another*, : AIR1979 Delhi64 , a dispute means that one party has a claim and the other party says for some specific reasons that this is not a correct claim. Difference has a similar meaning. *Hindustan Copper v. Assam Bearing*, 1980 Rlr 29 and *National Su. Ind. Corporation v. Punjab Tin Print*, 1979 Rlr 289, have also taken the same view. According to *Union of India v. Birla Cotton, Spinning and Weaving Mills Ltd.*, : [1964]2SCR599 , what is to be seen is whether there has been a breach by one side or the other or whether circumstances have arisen which have discharged one or both parties from further performance. To my mind, when the plaintiff files a suit for dissolution and rendition of accounts which the defendant wants to contest, a dispute as to dissolution and accounts has certainly arisen. Plaintiff in his telegram of June 25, 1979 himself had asked for arbitration. I do not see why there should not be an arbitration to settle the matters as to which, even if there was no actual dispute, there would probably be a dispute unless they were so settled: *Chambers v. Goldthorpe*, (1901) 1 Q.B. 624. Where the charges of mismanagement, fraud and breach of duty are alleged and denied, a dispute is obviously there and a dispute relating to defendant's conduct as partner does not only touch the terms of partnership but is very much concerned with implementation and working of the business of the partnership. The claims for dissolution and accounts, to which the plaintiff would be entitled if he establishes the charges made against the defendant, are clearly within the reference agreed upon between the parties; vide *Ballaidas Ashariva v. Shyam Sunder Balwasiva*, 2nd (1946) 1 Cal. 203. I, therefore, reverse the finding of the learned court below that the defendant has not been able to specify the dispute.

(10) The next question now to be examined is whether challenging the suit on the grounds of deficiency of court fee and of lack of jurisdiction of the court is a step taken and stay of proceedings cannot be allowed. Section 34 of the Arbitration Act requires that stay application should be made before filing of the written statement or taking any other step in the proceedings. The steps to which the learned court

below has referred were all subsequent: to the filing of the application for stay and therefore, by no stretch of imagination could it be said that the application was made after taking any step. I need not, therefore, go into a larger question as to what those kinds of steps are which if taken would prevent an application under section 34 from being made. That question simply does not arise in this case. I may, however, add that say step such as filing of written statement or making any other application may be taken with or without an order of the court after the stay application, without affecting its fate: *The Hanuman Chamber of Commerce Ltd. v. Parmeshri Lal Co. etc.*, Air 1951 Him 173.

(11) Now the crucial point is whether this is a case in which the court should not have refused stay of proceedings. The learned counsel for the appellant submits that the partnership is at will and at any rate it stood already dissolved on June 25, 1979 and only accounts are to be taken, which task could eminently and easily be performed by the arbitrator. It actually had ceased to work on October 4, 1979. What has been dissolved can not be dissolved again. When the special provision under section 43 of the Partnership Act are available, the general provisions under section 44 thereof cannot be invoked. It can not further be invoked because the business having been stopped, there was no question of carrying on the business save at a loss. Even if it were held that the firm was not yet dissolved the respondent has shown undue haste in filing a suit without giving three month's notice according to the terms of the partnership. As held in *Suraj Bahadur v. Mahadeo*, in a suit for dissolution under section 44(f) & (g) of the Partnership Act the court has a discretion to act or not. And relying upon *Sat Pal Anand and other v. R.K. Ahuja and others*, , it was urged that section 44 would be inapplicable in a case of a partnership-at-will. In a partnership of this kind, dissolution is not an equitable right but it is a legal right; *Ram Singh v. Ram Chand*, Air 1924 Pc 2. The court's discretionary powers under section 44 can be invoked only in cases where the partners cannot claim a termination of the business as a matter of right under the terms of their contract. In *State of Punjab v. M/s. Geeta Iron & Brass Works Ltd.*, Air 1973 S.C. 1608, the Supreme Court has observed that where parties have by contract agreed to refer their disputes to arbitration, the courts should as far as possible proceed to give an opportunity for resolution of dispute by arbitration rather than by judicial adjudication.

(12) On the basis of *Sardar Hardutt Singh v. Ch. Mukha Singh and others*, Air 1973 J & K 46, it was urged on the other hand by the learned counsel for the respondent that neither section 43 of the Partnership Act which deals with dissolution of Partnership at will by notice in writing, nor contract between the parties can control the provisions of section 44. Section 44 confers an absolute and independent right on partner to have the partnership dissolved on any of the grounds specified therein and it is not open to the parties to take away that right even by means of a contract to the contrary. The court alone can deal with a suit under section 44, cl. (f) and (g); vide *Ganesh Chander Dey and another v. Kamol Kumar Agarwalla*, 0065/1971 : AIR1971 Cal317 . The provisions of section 34 of the Arbitration Act are discretionary and in certain circumstances stay may be refused; see *State of Punjab v. M/s Geeta Iron & Brass Works Ltd.* (supra). According to *Anderson Wright Ltd. v. Moran & Co.*, : [1955]1SCR862 , and *Kashmiri Lal v. Union of India*, Air 1966 J & K 134, where the formation, existence or validity of the arbitration agreement or an arbitration clause in a contract, is in question, the court is not bound to stay but may in its discretion, on the application for stay, proceed to decide such question. As per *Bowrah Oil Mills Ltd. v. Ramchandrah Nagaran Rice & Oil Mills Ltd. and another*, Air 1955 Nuc court. appellate the by lightly with interfered be not should exercise such arbitration, against court exercised been has discretion .where that urged vehemently was it Lastly, : [1962]3SCR702 another, and *Oak Prabhakar Madhav v. Rubare Shamsuddin Kadir Abdul* (supra) *Hulwasiva Sunder Shyam Achariya Ballavdas* vide out, made case facie prima substantial A enough. are allegations general Vague particulars. supported clearly specific, fide, bona these provided other partner one faith good of want or dishonesty fraud charges serious where refused generally is Stay lands in left conveniently more may which matter a receiver appointment involve involves Dissolution power. this cannot arbitrator The parties. between contract independent wholly judgment solely grounds on dissolution required. justice whenever to power overriding an order This partnership. defined regulated have partners obligations right terms spite grounds, equitable protection court?s invoke inherent his but origin, its rests, for decree claim partner?s tried too matters all then Act, Partnership (g) (f) clauses 44 section under seeks also plaintiff defendant, alleged conduct unfair grave from apart If 281. Cal, 1972 India,

Union Ltd. Works Engineering Raymon 201, Mad. 1967 Srinivasan, S. others Padmanabhan N.C. 116 Pc 1917 Price, Bagum Rehmatunnisa decision; arising cases different nature varying according circumstances consider must Thus, first. question up take advisable challenged, jurisdiction if 4582,

(13) I have considered upon all these aspects. The plaint does not give instances and particulars of misappropriation but it alleges that the defendant did not contribute any money and lived upon the earnings of the circus and falsified the accounts. He also borrowed money but refused to disclose the borrowers. These allegations do make out a case of fraud and misappropriation and the court may perhaps be better able to deal with them. A partnership is always established in order to attain a given objective. Where it becomes no longer possible to attain that objective with which the partnership was started, a case is made out for dissolution which may be the only remedy under the circumstances. The plaintiff could have but did not dissolve the partnership by three months' notice and instead has invoked the power of the court. I do not find anything in section 43 .of the Partnership Act which bars the discretionary powers of the court to dissolve a firm in the circumstances stated therein.

(14) There is no doubt that the decision of the arbitrator can decide disputes both as to fact and law and the parties should not be relieved from a tribunal they have chosen; M/s Amarchand. Lalit Kumar v. Shree Ambica Jute. Mills Ltd., : [1963]2SCR953 . But a party to an arbitration agreement cannot claim stay of legal proceedings as a matter of right. At the same time, the discretion vested in the court must be properly and judicially exercised. If it appears to the appellate court that in exercising its discretion the trial court has acted unreasonably or capriciously or ignored relevant facts and has adopted an unjudicial approach, then it would certainly be open to the appellate court to interfere with the trial court's exercise of discretion, vide the Printers (Mysore) Private Ltd v. Pothan Joseph, : [1960]3SCR713 . Though the policy of the law ought to be to encourage arbitrations and more and more private settlement of disputes even those relating to allegations of fraud and misappropriation, but hardly are the litigants satisfied with awards and the widening interpretation of misconduct has opened up fresh fields of battle. Some times therefore, paradoxically enough, denial of arbitration

is justified in order to shorten litigation. I will hence refuse to interfere with the order of the learned court below on the ground that the appellant continued to operate for over two months that is from the end of June to the beginning of October and incur more losses even after the telegraphic notice not to do so, and in spite of the commissioner having been appointed by the court to prepare the inventory. The circumstances are really such as the court and not the arbitrator is better equipped to handle.

(15) I therefore, uphold the impugned order and dismiss this appeal but will refrain from making any order as to costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com