

Nitya Kumar Chatterjee Vs. Sukhendu Chandra

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Court : Kolkata

Decided On : Nov-24-1976

Reported in : AIR1977Cal130,(1977)ILR2Cal434

Judge : Salil Kumar Datta and ;H.N. Sen, JJ.

Acts : [Arbitration Act, 1940](#) - Section 34; ;[Partnership Act, 1932](#) - Section 44

Appeal No. : C.R. No. 2896 of 1975

Appellant : Nitya Kumar Chatterjee

Respondent : Sukhendu Chandra

Advocate for Def. : Kalipada Chakravarti, Adv.

Advocate for Pet/Ap. : Sakti Nath Mukherjee and ;Ramapati Roy, Adv.

Judgement :

Salil Kumar Datta, J.

1. The opposite party instituted a suit in the Third Court of Subordinate Judge, Alipore on March 24, 1975 registered as Title Suit No. 59 of 1975 for a decree of dissolution of partnership of the business called 'United Syndicate' carried on by the parties and for accounts, for appointment of a Commissioner for accounts and of Receiver for running partnership business, day to day administration thereof

and for collection of assets. The allegations were in short that the defaulting partner, who is the defendant in the suit and the petitioner before us, had been committing serious breaches of agreement of partnership which had been set out in the paragraph 9 of the plaint. It was submitted that as by reason of his conduct it had not been practicable for the plaintiff to carry on the partnership business, it was just and equitable that the partnership should be dissolved.

2. As the notice of the suit was served on the defendant he filed an application on 7th April, 1975 not verified by affidavit, stating that under the terms of the written partnership agreement all disputes arising out of the partnership should be referred to the Arbitration. Accordingly the Court had no jurisdiction to entertain the suit which should be stayed. Thereafter the petitioner filed another application on April, 18, 1975, which was also not verified by affidavit and it was stated therein that 'the defendant was and is ready and willing to go to Arbitration.' On this application the learned trial Judge passed an order on May 7, 1975 allowing the application and stayed the suit and he further directed that the suit be referred to Arbitration of two Chartered Accountants named in the partnership deed.

3. On appeal the learned District Judge, Alipore by his order dated July 4, 1975 allowed the appeal and rejected the petitioner's application for stay of the suit under Section 34 of the Arbitration Act. This Rule is against this order.

4. Mr. Saktinath Mukherjee learned Advocate appearing for the defendant petitioner submitted that the Appellate Court was wrong in rejecting the application of the defendant on the ground that it was not verified by affidavit. He submitted that this point was not taken in the Trial Court and if there was any defect in verification, the Court should have given an opportunity to the defendant to take necessary steps to remove the alleged defect instead of rejecting the same on technical ground.

5. Under Section 34 of the Arbitration Act there must be the following conditions for grant of stay of suit as laid down in *Anderson Wright Ltd. v. Moran & Co.*, : [1955]1SCR862 .

- (i) The proceeding must be initiated by a party to arbitration agreement against another party to such agreement.
- (ii) The legal proceeding sought to be stayed must be in respect of matter to be referred to Arbitration.
- (iii) The applicant who must not take any step in suit, was at the time of commencement of proceedings and still remains ready and willing to do all things necessary for proper conduct of the Arbitration.
- (iv) The Court must be satisfied that there is no sufficient reason why the matter should not be referred to arbitration.

6. Our attention has been drawn to the decision in *Padmanabhan v. Srinivasan*, : AIR1967 Mad201 where the Court found that the averment for arbitration was insufficient. In *Srivenkateswara Constructions v. Union of India*, : AIR 1974 AP278 , even though there was absence of averment by the defendant about his readiness and willingness to go to arbitration and the other party's attention was merely drawn to arbitration clause, in the context in which such statement Was made, the Court felt satisfied that the defendant was ready and willing to go to arbitration. In the case before us, the petitioner does not categorically and Unequivocally or even at all say that he was always at the material time ready and willing to do all things for the proper conduct of arbitration and such readiness is not to be inferred by implication. An insufficient averment cannot be rectified by amending the verification only. We are conscious that this defect was condoned by the appellate Court for reasons we find difficult to accept and it seems to us to be too patent to be ignored.

7. Mr. Mukherjee next challenged as untenable the conclusion of the learned Judge that when grave charges of fraud, misappropriation and unfair conduct of the partner are alleged, such matters should conveniently be dealt with by a Court instead of by an arbitrator. It was said that the averments of fraud are only general allegations instead of being specific as is required. We have considered the pleadings and we find that the allegations cannot be said to be not specific as isrequired in pleadings. Sub-clauses (b), (c), (e), (f) and (g) of paragraph 9 of the

plaint at least appear to be sufficiently specific allegations of fraudulent conduct which has to be established in evidence during trial.

8. It was then submitted on authority that the defendant against whom charges are made in such case has a choice of forum which is not available to the plaintiff. Reliance was placed on the decision in *Manindra Chandra v. Low & Co. Ltd.*, AIR 1924 Cal 796, where it was held that the Court should refuse to send the dispute to arbitration when the party charged wants a public trial in Court while the Court would be less inclined to send it to public trial at the desire of the party making the charges instead of arbitration. It was also held in *Eastern Steam Navigation Co. Ltd. v. India Coastal Navigation Co. Ltd.*, ILR (1942) 2 Cal 539 = (AIR 1943 Cal 238), that in case of charge of conspiracy and fraud which is directly an issue between the parties such charge should be publicly investigated in the suit if so desired by the party charged. In *Ballavdas Achariya v. Shyam Sundar*, ILR (1946) 1 Cal 203, this Court followed the principle in *Russell v. Russell* 1880-14 Ch D 471, laying down that when objection to arbitration is by the party charging the fraud, the Court will never accede to the objection unless a prima facie case of fraud is proved. The Court in that case granted a stay as upon affidavits no prima facie case was at all made out.

9. Even in *Manindra Chandra's* case, (AIR 1924 Cal 796) the Court noticed that in *Russell's* case it was decided that where a prima facie case of fraud is made out, the action will be allowed to proceed. In view of the above authorities and in the case before us of the grave charges of fraudulent conduct on the part of the defendant, we also consider it desirable that the matter should have the trial in Court, as arbitration is not the most suitable method of determining the questions raised between the parties.

10. Next question relates to the scope, ambit and effect of Section 44 of the Indian [Partnership Act, 1932](#) on arbitration. Assuming that the arbitration clause in the partnership agreement includes the question of dissolution, which we think it does, even so when party approaches the Court to dissolve the partnership on ground that it is just and equitable to do, the jurisdiction of the Court is always there to give appropriate relief notwithstanding the provision for arbitration. In

Rehmatunnissa Begum v. Price, AIR 1917 PC 116, the Privy Council observed:

'A partner's claim to decree for dissolution rests, in its origin, not on contract, but on his inherent right to invoke the Court's protection on equitable grounds, in spite of the terms in which the rights and obligations of the partners may have been regulated and defined by the partnership contract.'

11. This proposition of law has since found its expression in Section 44 of the [Partnership Act, 1932](#) and the Court's power to order dissolution of partnership under provisions of Section 44 is not conditioned by an agreement between the partners to the contrary. The jurisdiction, which a Court will exercise in such case, will however always be a judicial discretion in the context of pleadings and facts of a case against the background of the provisions for arbitration in the partnership agreement and the propositions of law set out by judicial decisions. In the case before us, we are of opinion that the judicial discretion was rightly exercised in the circumstances of the case.

12. Mr. Mukherjee referred us to the refusal of stay to arbitration in cases coming under Section 35 (f) of English Partnership Act, 1890 (our Section 44(g)) asking for exercise of Court's discretion on just and equitable grounds and for appointment of receiver and manager laid down as a proposition of law in Olver v. Hillier, (1959) 2 All ER 220 and recorded as such in Supreme Court Practice, 1973. This principle in the attending circumstances of the respective cases was followed by A. N. Sen, J. in Award No. 105 of 1966 dated October 7, 1966 (unreported) and also in Ganesh Ch. Dey v. Kamal Kumar, 0065/1971 : AIR1971 Cal317 . Mr. Mukherjee submitted that the above proposition of law as laying down that a stay to arbitration must be refused when there is a claim for dissolution on just and equitable grounds with prayer for appointment of Receiver/Manager was doubted in Phoenix v. Pope, (1974) 1 All ER 412 as it was observed, there could be no inevitable [exercise of discretion.

13. In view however of the law enunciated by the Privy Council in Rehmatunnissa's case (AIR 1917 PC 116) and of the provisions of Section 44, we are of opinion that the Court's jurisdiction in appropriate cases is not ousted by any provisions for arbitration in the partnership agreement. The exercise of such

jurisdiction being a matter of judicial discretion in the context of attending circumstances, there can be no inevitability in the exercise of jurisdiction by a Court of law.

14. For the reasons already indicated we are of opinion that the stay was rightly refused by the appellate Court.

15. The rule accordingly fails and is discharged. There will be no order for costs in the circumstances.

H.N. Sen, J.

16. I agree.

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