

Smt.Kalpana Kothari Appellant vs Smt.Sudha Yadav & Ors. Respondents on 31 October, 2001

Equivalent citations: AIR 2002 SUPREME COURT 404, 2001 AIR SCW 5214, 2002 CLC 425 (SC), 2003 (6) COM LJ 529 SC, (2003) 6 COM LJ 529, 2002 (1) SCC 203, 2001 (3) ARBI LR 487, 2001 (7) SCALE 560, (2001) 9 JT 337 (SC), 2001 (9) JT 337, (2001) 3 ARBILR 487, (2002) 1 UC 167, (2002) 2 MAD LW 209, (2001) 8 SUPREME 402, (2002) 1 ICC 61, (2001) 7 SCALE 560, (2002) WLC(SC)CVL 85, (2002) 46 ALL LR 11, (2002) 1 ANDH LT 30, (2002) 1 ALL WC 115, (2002) 1 CIVLJ 712

Bench: S. Rajendra Babu, Doraiswamy Raju

CASE NO.:

Appeal (civil) 7404-7406 of 2001

Appeal (civil) 7407-7409 of 2001

PETITIONER:

SMT.KALPANA KOTHARI

Vs.

RESPONDENT:

SMT.SUDHA YADAV & ORS.

DATE OF JUDGMENT: 31/10/2001

BENCH:

S. Rajendra Babu & Doraiswamy Raju

JUDGMENT:

RAJU, J.

Special leave granted.

Having regard to the nature of the orders under challenge and the stage of the proceedings, we consider it inappropriate to refer to or delve in great detail with the allegations and claims on either side, in this judgment. But, it becomes necessary to deal with the background of the disputes between parties on a birds eye view.

One Shri Laxmi Narain Yadav (since dead) was running a hotel business in tourist bungalow on Mirza Ismail Road at Jaipur, which belonged to him exclusively and absolutely. It was said to have been constructed on agricultural land without obtaining proper sanction and the proceedings were also said to have been initiated against him, in accordance with law. On 13.2.80, Laxmi Narain Yadav died leaving behind him a son Shri Vijay Krishna Yadav (a law graduate) and his wife Smt. Ashok Kumari and in a family settlement arrived at thereafter, the entire land and building admeasuring 5354 sq. yds. (4478 sq. meters) of the Tourist Hotel as such fell to the share of the son Shri Vijay Krishna Yadav. Thereafter, he made a notional division of the property into three shares measuring 1184 sq. meters, 1587 sq. meters and 1707 sq. meters in favour of himself, his wife Smt. Sudha Yadav and son Prashant Yadav. On 31.1.87, a partnership by name M/s Sumeru Enterprises was entered into between Shri Yadav, his wife, M/s Padmini Enterprises Private Ltd. and one Smt. Kalpana Kothari, besides admitting the minor Prashant Yadav to the benefits of partnership, with share in profits at 11%, 12%, 32.5%, 32.5% and 12% with shares in losses at 14%, 15%, 35.5%, 35.5% and nil respectively among them. The property of the Tourist Hotel was brought into as the stock of the Firm and valuing the same at 61% the respective shares was credited into the Capital Account of the Firm as Rs.17,00,000/-, Rs.22,00,000/- and Rs.22,00,000/- respectively in the names of Shri Yadav, his wife Smt. Sudha Yadav and their minor son Prashant Yadav. The rest of the capital was said to be required to be arranged by the other partners M/s Padmini Enterprises Pvt. Ltd. and Smt. Kalpana Kothari. For purposes of the partnership business, the land was got converted from agricultural use to commercial use on payment of the required conversion charges by the Firm and a registered lease-deed was entered into between the State represented by the Governor of Rajasthan and the Firm M/s Sumeru Enterprises on 3.3.89. The building plans were said to have been got approved from the Jaipur Development Authority in July 1991 and thereafter on 5.10.91, all the partners of M/s Sumeru Enterprises seem to have entered into an agreement with M/s Parasnath Builders Pvt. Ltd., as per the terms of which, among other things, the builders were appointed as Agent and Manager, not only to execute the constructions but also to enter into negotiations for sale of the apartments (shops, offices, etc.) on such terms and conditions and at such rate or prices as prevalent in the market with the intending purchasers. All the partners also were said to have executed a Power of Attorney dated 2.11.91 duly registered in favour of M/s Parasnath Builders Pvt. Ltd.

While matters stood thus, Shri Vijay Krishna Yadav also expired on 23.12.91 leaving behind a Will dated 16.12.91 as to the mode of succession and an order of Letters of Administration dated 13.9.93 was said to have been obtained from the District Judge, Jaipur City, on the basis of the Will dated 16.12.91. A sum of Rs.2.50 lakhs each was to be and has been given to each one of the daughters, Preeti Yadav and Mamta Yadav, and the shares in the Partnership in question of late Shri Yadav had been divided equally between his wife and son resulting in modification and due alteration and adjustment of shares in the property of the Firm so far as Smt. Sudha Yadav and Prashant Yadav came to be made with Smt. Yadav holding 17.5% and Master Prashant Yadav holding 17.5% with share in loss of Smt. Yadav at 29% both of hers and of her late husband, put together. After obtaining Letters of Administration, Smt. Sudha Yadav was said to have written two Letters dated 7.10.93 and 31.1.94 approving and confirming the accounts of the Firm. It was also claimed for the appellants that withdrawals by crossed cheque payments came to be made from the Firm on account of late Shri Yadav at Rs.10,14,203/- (including the payment of Rs.5 lakhs as per direction in the Will

and Letters of Administration), of Smt. Yadav at Rs.20,03,432/- and of Master Prashant Yadav at Rs.10,03,432 (in all Rs.40,21,067/- from the funds of the Firm). After all these, a sum of Rs.6,82,650.52 (Rs.3,41,325.26 each) was said to be lying to the credit of Smt. Yadav and Master Prashant Yadav in the accounts of the Firm. The further claim of the appellants seems to be that on effecting sales of some of the apartments, the profits earned were also distributed among the partners by proper credit entries of Rs.5,96,829.30 each in favour of Smt. Yadav and Prashant Yadav and Rs.11,08,397.28 each in favour of Smt. Kalpana Kothari and M/s Padmini Enterprises Pvt. Ltd. It is also claimed that till October 1995, a total number of 173 offices and shops came to be disposed of and of which possession in respect of 154 were also said to have been delivered to the buyers and several crores of rupees were ploughed into for executing the construction works.

Misunderstanding seems to have surfaced among parties resulting in the issue of a notice dated 1.2.95 by Smt. Yadav making serious allegations of malpractices and irregularities against others in the Firm followed by a suit for dissolution of the Partnership Firm through Court under Section 44 (g) of the Partnership Act, and for rendition of accounts, filed on 17.10.1995. In the meantime, through one Shri Yadvendra Singh (the real brother of Smt. Yadav) the minor Prashant Yadav also seems to have filed a suit on 30.3.1995, which came to be withdrawn subsequently and followed by a fresh suit in September 1995, staking a claim for the entire property left behind by late Shri Laxmi Narian Yadav, as his own. It is stated that in this suit Smt. Yadav has been made a party defendant as she had made Prashant Yadav as party defendant also in her suit.

Smt. Yadav, in her suit, has filed an application for the appointment of a Receiver as also an application for injunction. M/s Parasnath Builders Pvt. Ltd. as well as Smt. Kalpana Kothari filed applications under Section 34 of the Arbitration Act, 1940, in the Trial Court, relying upon the arbitration clauses contained in the Partnership Deed dated 31.1.87 and the agreement dated 5.10.1991 entered into by the Firm with the Builders. The applications filed for appointment of Receiver and also the one for injunction also were opposed by these defendants in the suit. On a consideration of the materials on record and also the respective contentions of parties, by an order dated 6.2.96, the applications for injunction as also for the appointment of Receiver were rejected by the Trial Court. Similarly, the suit was also stayed by allowing the applications filed under Section 34 of the Arbitration Act, 1940. Aggrieved, Smt. Sudha Yadav has filed before the High Court S.B. Civil Misc. Appeal No.251 of 1996 against the order dismissing the application for appointment of a Receiver made under Order 40 Rule 1, CPC, S.B. Civil Misc. Appeal Nos.550 of 1996 and 635 of 1996 (defect) against the orders passed on the respective applications filed under Section 34 of the Arbitration Act, 1940. On 27.8.99, the defendants, who filed applications before the Trial Court under Section 34 of the Arbitration Act, 1940, moved applications in writing before the High Court stating that they do not press their applications under Section 34 of the Arbitration Act, 1940, in view of the repeal of the 1940 Act and for their dismissal as not pressed and consequently, the same was allowed on 7.10.99. The minor Prashant Yadav was also said to have attained majority on 21.9.97. But, subsequently in about two months time the very same defendants (respondents 1 & 2 before High Court) filed an application on 26.10.99 under Section 8 (1) of the Arbitration and Conciliation Act, 1996, with a prayer that the proceedings before the Trial Court be stayed without prejudice to the rights under Section 8(3) of 1996 Act, till the commencement/continuation of the arbitration proceedings and making of the Arbitrators award. A learned Single Judge of the

Rajasthan High Court at Jaipur by the order dated 18.1.2000, under challenge in these appeals, set aside the orders of the Trial Court dated 6.2.96, and held as follows:

- a) The balance of convenience is in favour of appointment of a Receiver for preserving as well as managing the property to save it from any anticipated loss till the decision of the suit;
- b) that having got the application earlier filed before the trial court under Section 34 of the Arbitration Act, 1940 which was in force at the time of filing of the suit dismissed as withdrawn, it is not permissible to invoke the powers under Section 8 of the Arbitration and Conciliation Act, 1996 to obtain the relief of stay of further proceedings;
- c) that by their conduct as above they are estopped from filing a fresh application.

Heard Sarva Shri R.F. Nariman and Bhaskar P. Gupta, Senior Advocates, for the appellants and Dr. P.C. Jain, Advocate, for the respondent-plaintiff. The learned counsel appearing on either side vehemently tried to project the claims of the respective parties both on grounds pertaining to legal issues and relevant facts. On a careful consideration for the same and the reasons assigned by the learned Judge in the High Court, we find it difficult to affix our approval to the order under challenge.

The first respondent herein has filed the civil suit for dissolution of the partnership and for accounts and also filed applications for the appointment of Receiver and for injunction. The defendants have initially filed applications in the suit before the Trial Court invoking the provisions contained in Section 34 of the Arbitration Act, 1940 and not only the applications filed by the first respondent before the Trial Court were rejected but the applications under Section 34 of the Arbitration Act by the appellants came to be allowed and further proceedings in the suit filed by the first respondent came to be stayed. No doubt, at the appellate stage, after filing a written application for dismissal of the applications filed by the appellants under Section 34 of the Arbitration Act, 1940, as not pressed in view of the repeal of the 1940 Act and coming into force of the 1996 Act and getting orders thereon, the appellants herein have once again moved the High Court under Section 8 of the Act, with a request for stay of proceedings before the High Court as well as the Trial Court, but the application came to be rejected by the learned Judge in the High Court that no such application could be filed, once the application earlier filed under 1940 Act was got dismissed as not pressed and also on the ground of estoppel, based on the very fact. We are of the view that the High Court did not properly appreciate the relevant and respective scope, object and purpose as also the considerations necessary for dealing with and disposing of the respective applications envisaged under Section 34 of the 1940 Act and Section 8 of the 1996 Act. Section 34 of the 1940 Act provided for filing an application to stay legal proceedings instituted by any party to an arbitration agreement against any other party to such agreement, in derogation of the arbitration clause and attempts for settlement of disputes otherwise than in accordance with the arbitration clause by substantiating the existence of an arbitration clause and the judicial authority concerned may stay such proceedings on being satisfied that there is no sufficient reason as to why the matter should not be referred to for decision

in accordance with the arbitration agreement, and that the applicant seeking for stay was at the time when the proceedings were commenced and still remained ready and willing to do all things necessary to the proper conduct of the arbitration. This provision under the 1940 Act had nothing to do with actual reference to the arbitration of the disputes and that was left to be taken care of under Sections 8 and 20 of the 1940 Act. In striking contrast to the said scheme underlying the provisions of the 1940 Act, in the new 1996 Act, there is no provision corresponding to Section 34 of the old Act and Section 8 of the 1996 Act mandates that the Judicial Authority before which an action has been brought in respect of a matter, which is the subject-matter of an arbitration agreement, shall refer the parties to arbitration if a party to such an agreement applies not later than when submitting his first statement. The provisions of the 1996 Act do not envisage the specific obtaining of any stay as under the 1940 Act, for the reason that not only the direction to make reference is mandatory but not withstanding the pendency of the proceedings before the Judicial Authority or the making of an application under Section 8 (1) of the 1996 Act, the arbitration proceedings are enabled, under Section 8 (3) of the 1996 Act to be commenced or continued and an arbitral award also made unhampered by such pendency. We have to test the order under appeal on this basis.

On the ground of estoppel and the conduct of the appellants in getting their earlier application made under Section 34 of the 1940 Act dismissed as not pressed that the applications under Section 8 of the 1996 Act were not countenanced by the High Court. The fact that the earlier application under the 1940 Act was got dismissed as not pressed in the teeth of the repeal of the said Act cannot, in our view, constitute any legal impediment for having recourse to and avail of the avenues thrown open to parties under the 1996 Act. Similarly, having regard to the distinct purposes, scope and object of the respective provisions of law in these two Acts, the plea of estoppel can have no application to deprive the appellants of the legitimate right to invoke an all comprehensive provision of mandatory character like Section 8 of the 1996 Act to have the matter relating to the disputes referred to arbitration, in terms of the arbitration agreement.

So far as the need for or desirability of appointing the Receiver and granting of injunction, as prayed for, is concerned, the High Court does not seem to have taken into account the overall necessity to balance the interests of both parties. Since only the land has been said to have been brought into the partnership assets by the Plaintiffs husband with no other contribution of any further funds, that the land was got legally converted into one fit for commercial purposes of the Firm and the constructions were stated to have been put up only with the funds of the other partners or the builders, as the case may be, and the serious difficulties and loss to which the Firm and partners may be put into by freezing the day-to-day business activities of the Firm and the adverse impact on the credibility and reputation of the Firm, as a whole, do not seem to have engaged the attention of the High Court in passing the orders under challenge. The feasibility or otherwise of appointing Party Receiver and allowing them to carry on the day-to-day activities of the business subject to strict and effective control and accountability to the Court of the realizing of the business does not seem to have been considered at all before going out for the appointment of a third party Receiver and prohibiting any sales, completely. As long as the Arbitration clause exists, having recourse to Civil Court for adjudication of disputes envisaged to be resolved through arbitral process or getting any orders of the nature from Civil Court for appointment of Receiver or prohibitory orders without evincing any intention to have recourse to arbitration in terms of the agreement, may not arise.

For all the reasons stated supra, we set aside the orders of the High Court as also that of the Trial Court and remit the proceedings to the Trial Court which shall consider the matter afresh in the light of the claims and rights of the respective parties under the Arbitration and Conciliation Act, 1996 and pass such orders as it deem fit in accordance with law. Both parties are at liberty to move all or any applications for the purpose before the Trial Court. Though, we set aside the order of the High Court to facilitate the Trial Court to deal with the matter afresh, the status quo as brought about by the orders of the High Court shall continue till the Trial Court chooses to make its own orders or directions in this regard, uninfluenced by the earlier orders of its own or that of the High Court.

The appeals are allowed on the above terms with no order as to costs.

J. (S. Rajendra Babu) J. (Doraiswamy Raju) October 31, 2001.