M/S V.H. Patel & Company & Ors vs Hirubhai Himabhai Patel & Ors on 18 April, 2000

Bench: S.R.Babu, S.N.Phukan

PETITIONER:
M/S V.H. PATEL & COMPANY & ORS.

Vs.

RESPONDENT:
HIRUBHAI HIMABHAI PATEL & ORS.

DATE OF JUDGMENT: 18/04/2000

BENCH:
S.R.Babu, S.N.Phukan

JUDGMENT:

RAJENDRA BABU, J. :

A partnership firm, M/s V.H. Patel & Company, was constituted consisting of four brothers, namely, Jamnadas Himabhai Patel, Vallabhbhai Himabhai Patel, Gordhandas Himabhai Patel and Hirubhai Himabhai Patel, all sons of Dineshbhai Hirubhai Patel. On the death of Jamnadas Himabhai Patel the partnership was reconstituted with Gordhandas Himabhai Patel, Vallabhbhai Himabhai Patel, Hirubhai Himabhai Patel, Parmanand Jamnadas Patel and, Jatin Parmanand Patel and Akashya Parmanand Patel, sons of Parmanand Jamnadas Patel. The said firm is engaged in the business of manufacture, storage and sales of marketing of different variety of tobacco, tobacco preparations, zarda and allied products. It has three registered trade marks,

(i) Surya Chhap Zarda, (ii) Surya Chhap Tobacco and (iii) Pan Chhap 12 Number Zarda. Disputes having arisen relating to the business of the partnership firm, an `Agreement of Mutual Understanding' was executed by stating that all the said trade marks owned by the firm were to cease to be of one ownership but had to be owned by all the partners thereof. Respondent No. 1 and other partners were to use the said trade marks separately only in the territories allotted to them thereunder as per agreement with each of the partners having a percentage in the share of profits and losses under the then existing deed of partnership dated April 21, 1986. On August 1, 1987 a Deed of Retirement was executed by all the partners of the firm providing for retirement of respondent No. 1 as partner thereof on certain terms and conditions.

On July 28, 1989 a suit was filed by respondent No. 1 in Civil Suit No. 186/89 in the court of the Civil Judge, Senior Division, Chalisgaon, for a declaration that the retirement deed dated August 1, 1987 was ineffective, inoperative, unenforceable, null and void and that he continued to be the partner of the firm. On September 14, 1989 another suit was filed by the petitioners in the District Court, Chalisgaon, under the Trade and Merchandise Marks Act, 1958 for injunction against respondent No. 1 Hirubhai Himabhai Patel and his two sons Praveen Hirubhai Patel and Dinesh Hirubhai Patel and their partnership firm not to use and exploit the aforesaid three trade marks under the name of M/s H.H. Patel & Company and for other incidental reliefs. On the basis of the pleadings raised, the District Judge, Chalisgaon, passed an order of injunction against respondent No. 1 Hirubhai Himabhai Patel and others restraining them from using and exploiting the three trade marks. Against the said order of injunction an appeal was preferred in the High Court which was allowed and injunction granted by the trial court was vacated.

Thereafter, a Special Leave Petition No. 11533 of 1990 was preferred before this Court against the order of the High Court. This Court passed an order on February 15, 1991 disposing of the matter in the following terms :- "On 16.1.1991 when this petition came up for hearing before us, we had suggested to the parties that having regard to their close relationship and the nature of the dispute it would be desirable to explore the possibility of settlement or have the dispute resolved through arbitration. The parties have now arrived at a consent order which is signed and presented by the learned advocates for the Petitioner and the Respondents, which we take on record. According to the consent terms the parties have agreed to have their dispute resolved through sole arbitration of Mr. Justice D.M. Rege (Retd.) of Bombay High Court. We direct an order to be drawn up in terms of consent terms. The Special Leave Petition will stand disposed of in terms of the consent terms."

The crucial part of the Consent Terms is also extracted hereunder which is contained in para No. 2 thereof :- "Both the parties agree that disputes relating to the rights and obligations of the parties arising out of the agreement dated 3.7.1987 and retirement deed dated 1.8.1987 and to the user of the trade marks in question and determination of the rights of respondent No.1 as a partner of the Petitioner firm as per the pleadings of the parties in suit No. 5 of 1989 and No. 186 of 1989 pending in the court of District Judge, Jalgaon and in the court of Senior Division Judge, Chalisgaon respectively be referred to the sole arbitrator of Shri D.M. Rege, Retired Judge Bombay High Court. The arbitrator will file the award in the Bombay High Court in accordance with the provisions of the Arbitration Act."

Thus the disputes between the parties which arose in the suit stood referred to sole arbitration of Justice D.M. Rege. Claims were preferred before the sole arbitrator by all parties. The arbitrator made an award on January 25, 1999. He declared that the writing/agreement dated July 3, 1987 and retirement deed dated August 1, 1987 is invalid, void, ineffective and not binding on the parties and created no rights or obligations between the parties thereto. He further declared that respondent No. 1 had not retired under the aforesaid deed but continued as a partner of the firm M/s V.H. Patel and Company from and after August 1, 1987. This relief was, however, to operate in favour of respondent No. 1 only on his paying an sum of Rs. 5,17,927.17 to the firm and it was also declared

that the three registered trade marks continued to be the assets of the firm M/s V.H. Patel & Company and M/s H.H.Patel & Company or its partners including Hirubhai Himabhai Patel or any other person has no right, title and interest in the said trade marks and they were permanently restrained from using and/or exploiting in the course of trade or otherwise any of the three registered trade marks in any territory. The arbitrator did not entertain the counter claim of the respondents seeking for dissolution of the firm M/s V.H. Patel & Company on the ground that it was beyond the scope of reference. On February 15, 1999 the partners of M/s V.H. Patel & Company assigned the three trade marks in favour of V.H. Patel Tobacco Private Limited, a private limited company owned by close relatives of the partners of M/s V.H. Patel & Company for Rs. 65 lakhs. The award was filed in the Bombay High Court. Respondent No. 1 filed an arbitration petition challenging the said award and prayed for setting aside the findings of the arbitrator on certain issues. The petitioners also filed an arbitration petition under Section 18 of the Arbitration Act, 1940 for interim relief of injunction and, another arbitration petition was filed by respondent No. 1 for partial decree in terms of the accepted part of the award, namely, in terms of (b) and

(c) of the operative part of the order and for status quo ante as on January 25, 1989 by setting aside the assignment deed dated February 18, 1999. The learned Single Judge of the High Court confirmed the award of the sole arbitrator so far as the declaration that the agreement dated July 3, 1987 and the retirement deed dated August 1, 1987 are ineffective, unenforceable and not binding on the parties. The learned Single Judge set aside the finding on issue No. 17, that is, whether the arbitrator has jurisdiction to entertain the counter claim by which counter claim respondent No. 1 had sought for dissolution of the firm of M/s V.H. Patel & Company and remitted the issue back to the arbitrator for de novo consideration and decision in accordance with law. The learned Single Judge directed that till the arbitrator makes a fresh award, arrangement in relation to the business as was in existence while the proceedings were pending before the arbitrator should continue to operate for a period of four weeks after the award was made. It was also made clear that the assignment of trade marks shall have no effect and the private limited company to whom the trade marks have been assigned shall not be entitled to do the business on the basis of those trade marks. This order of the learned Single Judge of the High Court that is in challenge before us.

The learned counsel for the petitioners Shri T.R. Andhyarujina and Shri Vinod A Bobde, the learned senior advocates, submitted that the principal question is whether the arbitrator was competent to entertain the counter claim filed by respondent No. 1 for dissolution of the firm M/s V.H. Patel & Company and falls within the scope of the terms of reference made by this Court on February 15, 1991; that the counter claim made by the respondent for dissolution of the firm was not within the terms of reference either expressly or impliedly and the parties did not refer the disputes relating to the firm to the arbitrator; that on the contrary, para 2 of the Consent Terms, which is extracted above, referred to the arbitrator specific disputes relating to the rights and obligations of the parties, (i) arising out of the agreement dated July 3, 1987, (ii) retirement deed dated August 1, 1987, (iii) to the user of the trade marks in question, and (iv) to the determination of the rights of respondent No. 1 as a partner of the firm as per the pleadings of the parties in the pending suits; that the pleadings of the parties in the suits did not include any claim by any partner for dissolution of the firm M/s V.H. Patel & Company; that there is no scope for raising a new plea by way of an amendment as to dissolution of the firm; and, that the arbitrator is bound strictly by the terms of the arbitration and

cannot travel beyond it. In this regard, reliance is placed on the decision of this Court in Orissa Mining Corporation Ltd. v. M/s Prannath Vishwanath Rawlley, AIR 1977 SC 2014. Much stress is also laid on the fact that the parties have not referred all disputes between them or relating to or arising under the partnership for reference to the arbitrator so as to bring within it any future disputes which could arise between the parties. Therefore, it is submitted that the view of the High Court that "it is open to the respondent to claim a decree for dissolution of the firm in exercise of his rights as a partner of the firm which he could have made by amending his pleadings in the civil suit which was capable of being made" is incorrect. It is pointed out that reliance placed on the decision in Indian Oil Corporation Ltd. v. Amritsar Gas Service and Ors, 1991 (1) SCC 533, is wrong. It is submitted that in that case there was scope for fresh pleading as the reference to arbitrator was made by the court in an appeal arising out of refusal to stay the suit under Section 34 of the Arbitration Act and the reference was made of all the disputes between the parties in the suit and, therefore, the occasion to make a counter claim in the written statement could arise only after the order of reference. Another ground is raised in support of this contention that the terms of partnership do not contemplate dissolution of the firm "at will" but by "mutual agreement". Therefore, it is pointed out that dissolution of the firm is based only on just and equitable ground and, therefore, partners' claim for a decree for dissolution of the firm rests in its origin not on contract but on the inherent right to invoke the courts' jurisdiction on equitable grounds in spite of the terms in which the right and obligation of the parties may have been regulated and defined by the partnership contract.. Our attention is drawn to a decision in Rehmatunnissa Begum & Ors. v. Price & Ors., AIR 1917 P.C. 116, and the commentary made by Pollock and Mulla in 5th Edition at page 147 which reads as follows :- "Although the arbitration clause in a partnership agreement may be sufficiently wide to include the question whether the partnership should be dissolved, the Court in its discretion may not stay a suit for dissolution, if dissolution is sought under Section 44(g)(e). In the undermentioned cases the view taken is that whenever dissolution of partnership is sought under Section 44(g), then it is for the court to decide, whether it would be just and equitable to dissolve the partnership or not and such a matter cannot be left to be gone into and decided by the arbitrator in pursuance of the arbitration clause contained in the partnership deed."

In that view of the matter it is submitted that the parties could not have intended to have referred a claim for dissolution of the partnership under the inherent powers of the court and an intention to act consistently within the law and practice relating to arbitration should be attributed to the parties when they entered into the consent order before this Court. Shri R.F. Nariman and Shri V.A. Mohta, the leaned senior advocates for the respondents, submitted that an appeal to the Division Bench of the High Court would lie from the judgment of the learned Single Judge and a special leave petition should not be entertained by us. In answer to this contention the learned counsel for petitioners pointed out that under the Indian Arbitration Act, 1940 an appeal from a judgment remitting the award to the arbitrator for reconsideration does not lie and it is only in respect of appeals to which specific reference is made in Section 39 an appeal would lie. Shri Mohta, however, placed reliance on the decisions of this Court in Iftikhar Ahmed & Ors. v. Syed Meharban Ali & Ors.,1974 (2) SCC 151, Union of India v. Mohindra Supply Company, 1962 (3) SCR 497, and State of West Bengal v. M/s Gourangalal Chatterjee, 1993 (3) SCC 1. The learned counsel for the respondents further drew our attention to a decision of this Court in Orma Impex Pvt. Ltd. v. Nissai Asb Pte. Ltd., 1999 (2) SCC 541, wherein it is stated that a question of similar nature has been referred to a Bench of Five

Judges.

Inasmuch as we have heard the learned counsel on either side on the merits of the matter, it is unnecessary to go into the question whether an appeal could have been preferred to the Division Bench in the High Court or not, particularly when a notice had already been ordered by this Court and the matter has been finally heard. We leave open this question to be raised in an appropriate proceeding. So far as the present case is concerned, it is suffice to say that we examine the merits of the matter as put forth before us and decide the case.

The contention of the learned counsel for the petitioners in this case pertains to the scope of reference to arbitration which turns around the terms of the order made by this Court on February 15, 1991 in Special Leave No. 11533 of 1990 and the Consent Terms on which the said order is based. It is no doubt true that in the two suits that had been filed there is no specific prayer for dissolution of the firm. The Consent Terms indicate that disputes relating to the rights and obligations of the parties arising out of the agreement dated July 3, 1987 and retirement deed dated August 1, 1987 and to the user of the trade marks in question were indeed referred to the arbitrator. The High Court is conscious of the question that the relief for dissolution of the firm was not one of the matters on which there was a dispute which was referred to arbitrator. However, the High Court is of the view that though in the plaint there is no prayer for dissolution of firm it was possible for the respondent to claim that relief in the civil suit and as the civil suit was withdrawn pursuant to the agreement reached before this Court, such a prayer is, therefore, made before the arbitrator as all the disputes between the parties in the suits filed by the parties were referred to the arbitrator. The High Court placed strong reliance upon the decision of this Court in Orissa Mining Corporation Ltd. v. M/s Prannath Vishwanath Rawlley (supra). Distinction is sought to be made between the aforesaid case and the present case on the basis that the reference was made of all the disputes between the parties, a counter claim in the written statement could arise only after the order of reference and in those circumstances, the reference would cover all disputes between the parties, including one raised in the counter claim. In answer to this aspect it is noticed that the first respondent filed a suit as partner of the firm M/s. V.H. Patel & Company for enforcing some of his rights as a partner and seeking dissolution of the firm is also a right of a partner and had the suit remained pending, it was possible for him to amend his plaint seeking an order for dissolution of the firm, the cause of action for seeking such relief would be the same on which his claim in the suit was based. Cause of action for a counter claim can be different from the cause of action for the suit and, therefore, it would be permissible to hold that a claim which is based on the same cause of action on which the suit is based cannot be considered. The High Court is of the view that once the matter is referred to the arbitrator his jurisdiction to consider all questions raised before him by the parties which relate to the dispute could be considered and driving a party to a separate litigation for the relief which relates to the dispute referred to the arbitrator would not be proper. Therefore, the High Court held that the it is open to respondent No. 1 to claim a decree for dissolution of the firm in exercise of his rights as a partner of the firm which he could have made by amending his pleadings in the civil suit and, therefore, it is within the jurisdiction of the arbitrator to consider that question. It is further to be seen that the parties are from the same family, there were disputes between them, they tried to resolve the disputes by entering into an arrangement which ultimately failed.

We asked the parties to appreciate the matter in the proper perspective to produce the Partnership Deed and the Partnership Deed dated April 21, 1986 is produced before us. Clause 5 provides that "the partnership is commenced on and from the 2nd day of April 1986 and shall continue for a term of period until the parties herein before mentioned mutually agree to dissolve". Clause 11 thereto provides that "all dispute and questions in connection with the partnership or with this Deed existing between the parties shall be referred to Arbitration under the provisions of the Indian Arbitration Act, 1940, or any Statutory modification or re-enactment thereof for the time being in force." In the suit filed before the court it is no doubt true that one party, respondent No. 1, was seeking to establish that he had not retired from the partnership and, therefore, there is justification in the criticism levelled by the learned counsel for the petitioner that the prayer for dissolution of the firm is inconsistent with such a claim. But that is not the end of the matter. Even if he had not retired pursuant to the terms of the agreement entered into between the parties, it is certainly permissible for him when disputes had arisen between the parties to ask for dissolution of the partnership and when that was not possible by mutual consent a dispute could certainly arise thereto and such a dispute could have been referred to arbitration as provided in clause 11 of the Partnership Deed. If that was permissible, such a contention could be raised in the suit filed by the parties. Merely because the disputes between the parties have been referred to arbitration, he is not prevented from raising such a question or the arbitrator is prevented from deciding such a matter. Therefore, agreeing with the view expressed by the High Court, we reject the contention raised on behalf of the petitioner that it was not permissible for the arbitrator to enter upon the question of dissolution of the partnership. Though the disputes between the parties originated on the basis whether one or the other partner had not retired from partnership or as to the rights arising in relation to trade marks or otherwise, still when there is no mutual trust between the parties and the relationship became so strained that it is impossible to carry on the business as partners, it was certainly open to them to claim dissolution and such a question could be adjudicated. The scope of reference cannot be understood on the actual wording used in the course of the order made by this Court or the concerned memorandum filed before this Court, but it should be looked from the angle as to what was the spirit behind the reference to the arbitration. The idea was to settle all the disputes between the parties and not to confine the same to any one or the other issue arising thereunder. In that view of the matter, the contention addressed to the contrary is untenable.

We asked the learned counsel as to whether the acceptance of the finding recorded by the arbitrator would put to an end all the disputes between the parties, it was frankly stated that it was not so. Therefore, still disputes would exist and even those disputes have to be resolved in one or the other proceeding. We fail to understand as to how the parties could not have raised appropriate pleadings in relation to disputes and get them resolved in the very suits that were already pending by appropriate modification of the pleadings. If that was permissible, certainly the present course adopted by the High Court is also permissible.

A contention has been raised before us that the arbitrator has no power to dissolve a partnership firm, especially on a ground that such dissolution is based on a ground or any other ground which renders it just and equitable to dissolve and that is the power of the court. It was pointed out that mere strained relationship between the partners would not be enough to dissolve a partnership. It is not necessary for us to examine this contention in this case when the partners sought for dissolution

of the partnership on various grounds enumerated in Section 44(c) to (f) may also be sufficient and may not be necessary to invoke the inherent jurisdiction of a court such as dissolution is just and equitable. If there has been breach of agreement and conduct is destructive of mutual confidence certainly such conduct can give rise to a ground for dissolution of the partnership. While mere disagreement or quarrel arising from impropriety of partners is not sufficient ground for dissolution, interference should not be refused where it is shown to the satisfaction of the adjudicating authority that the conduct of a partner has been such that it is not reasonably practicable for other partners to carry on the business in partnership. For instance, dissolution should be ordered if it is shown that the conduct of a partner has resulted in destruction of mutual trust or confidence which is the very basis for proper conduct of partnership. It is not necessary for us to go into or seek for an explanation of the reasons which may have induced the disputes between the partners. Dissolution will arise where it appears that the state of feelings and conduct of the partners have been such that business cannot be continued with advantage to either party.

So far as the power of the arbitrator to dissolve the partnership is concerned, the law is clear that where there is a clause in the Articles of Partnership or agreement or order referring all the matters in difference between the partners to arbitration, arbitrator has power to decide whether or not the partnership shall be dissolved and to award its dissolution. [See:Phoenix v. Pope & Ors., (1974) 1 All E.R. 512]. Power of the arbitrator will primarily depend upon the arbitration clause and the reference made by the court to it. If under the terms of the reference all disputes and difference arising between the parties have been referred to arbitration, the arbitrator will, in general, be able to deal with all matters, including dissolution. There is no principle of law or any provision which bars an arbitrator to examine such a question. Although the learned counsel for the petitioner relied upon a passage of Pollock & Mulla, quoted earlier, that passage is only confined to the inherent powers of the court as to whether dissolution of partnership is just and equitable, but we have demonstrated in the course of our order that it is permissible for the court to refer to arbitration a dispute in relation to dissolution as well on grounds such as destruction of mutual trust and confidence between the partners which is the foundation therefor.

For the aforegoing reasons, we find no merit in these petitions and the same stand dismissed.