

L. Raghunath Prasad And Ors. vs L. Gurdyal Prasad And Ors. on 27 September, 1955

Equivalent citations: AIR 1956 ALLAHABAD 194, ILR (1957) 1 ALL 195

Author: Raghubar Dayal

Bench: Raghubar Dayal

JUDGMENT

Brij Mohan Lal, J.

1. This is an appeal by the plaintiffs whose suit for dissolution of a partnership, for accounts and for damages has been dismissed by the learned Civil Judge of Agra.

2. The parties had entered into a partnership and had executed a lengthy document as the partition deed. Para 49 of the said document, which is the most material paragraph of the said deed for the purpose of this suit, runs as follows:

"All the partners shall work amicably & with co-operation. If, God forbid, any dispute arises, it shall be settled by a 'Panchayat' out of Court and Lala Lallomal, Lala Ramdayal and Lala Ganpat Lal shall be appointed as arbitrators and no suit shall be filed. In case any suit is filed it shall be fit to be dismissed. If any of the said arbitrators is not able to act as an arbitrator in respect of anything on account of some proper reason, some other proper arbitrator shall be appointed in his place."

3. The suit was resisted by the respondents but they did not ask for its stay under Section 34, Arbitration Act (10 of 1940). They filed a written statement & went to trial but contended that, in view of the aforesaid paragraph of the deed of partition, the suit was not maintainable. This plea found favour with the learned Civil Judge who dismissed the suit with costs. His findings may be quoted in his own words as follows:

"In the present case, I have come to the conclusion that even though the plaintiff has got a right of dissolution as provided under para 17 of the arbitration agreement his remedy was by means of arbitration as provided in para 49 of the Partnership Agreement. The parties by the terms of this para have agreed that no suit shall be filed and the parties will only have recourse to arbitration.

As such the present suit which is for dissolution and for accounts and to claim compensation for the acts done by the manager is covered within the term 'dispute' mentioned in para 49 and the proper remedy of the plaintiff was by arbitration and not filing the present suit."

4. Dissatisfied with this decision the plaintiffs have come in appeal and the only point that arises for decision before us is whether the suit was maintainable in the learned Civil Judge's Court.

5. It is contended by the learned counsel for the respondents that a "dispute" had arisen within the meaning of para 49 and therefore the said paragraph is applicable to the case. It is pointed out that the respondents' case was that the plaintiffs were entitled to neither of the three reliefs, viz., dissolution of the partnership, accounts and damages. We assume that there was a "dispute" between the parties within the meaning of para 49. The question that arises for decision is whether the respondents' remedy was to claim the stay, of the suit under Section 34, Arbitration Act or whether they could legitimately contend that the suit should be dismissed with costs.

6. Section 28, Contract Act, makes every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, void to that extent. There is, however, an exception which runs as follows :

"Savings of Contract To Refer To Arbitration Disputes That May Arise : This section shall not render illegal a contract by which two or more persons agree that any dispute, which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred."

When the Act was originally passed in 1872, there was another clause in this exception which ran as follows :

"Suits Barred By Such Contracts : When such a contract has been made a suit may be brought for its specific performance, and if a suit other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit,"

AS the law then stood, the existence of an arbitration agreement, such as that exists in the present case, was a complete bar to the maintainability of the suit. In 1877, however, the Specific Relief Act was passed and at that time this second clause of the exception was made inapplicable to areas to which the Specific Relief Act was extended. But a provision was made in Section 21, Specific Relief Act, to the effect that an agreement to refer a dispute to arbitration could not be specifically enforced; but if any person who had made such a contract and refused to perform it sued in respect of any subject which he had contracted to refer, the existence of such contract would bar the suit.

In other words, the change introduced in law was that whereas formerly an agreement to refer the dispute to arbitration could be specifically enforced, such an agreement ceased to be specifically enforceable after the passing of the Specific Relief Act. But the old law which barred the suit at the instance of a person who had been party to an arbitration agreement continued to be in force as before.

7. In 1908 the Code of Civil Procedure (Act 6 of 1908) was enacted and a further change was introduced in law. Paragraph 22 of the Second Schedule of the said Code ran as follows :

"The last thirty-seven words of Section 21, Specific Relief Act, 1877, shall not apply to any agreement to refer to arbitration or to any award, to which the provisions of this schedule apply."

The last thirty-seven words of Section 21, Specific Relief Act, referred to therein related to that portion of the section which contained a clause to the effect that a suit instituted by a person who had been a party to an arbitration agreement would be barred. This meant that the old rule barring such suits was repealed. But while repealing this rule the legislature did not, as will appear from para 18 to be presently quoted, give a free hand to persons who had been parties to arbitration to proceed with suits in law Courts and to ignore their own agreements.

8. Paragraph 18 of the Second Schedule of the said Code ran as follows :

"Where any party to any agreement to refer -to arbitration, or any person claiming under him institutes any suit 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 suit may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to the Court to stay the suit; and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was, at the time when the suit was instituted and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the suit."

In other words, the legislature altered the law to this extent that, while the plaintiff could institute a suit, it was left to the discretion of the defendant to either submit to the jurisdiction of the Court and to go on with the suit or to rely upon the arbitration agreement and to bring about the stay of the plaintiff's suit. While, on the one hand, he could neither seek specific performance of the agreement to refer the suit to arbitration nor claim the dismissal of the plaintiff's suit he could, on the other, prevent the plaintiff from proceeding with the suit and thus could bring about a stalemate.

This state of affairs was brought about with the possible object of thereby inducing the plaintiff to reconsider his position and to agree to submit the dispute to arbitration.

9. In 1940 the Arbitration Act was passed and Schedule II of the Code of Civil Procedure, including paras 18 and 22, was repealed. But the legislature re-enacted the rule of law contained in para 18 of the Second Schedule of the Code of Civil Procedure in Section 34, Arbitration Act.

10. Consequent on the repeal of para 22 of the Second Schedule of the Code of Civil Procedure, the legislature amended Section 21, Specific Relief Act, and the relevant portion thereof now runs as follows :

"And, save as provided by the Arbitration Act, 1940 (10 of 1940), no contract to refer pre-

sent or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract other than an arbitration agreement to which the provisions of the said Act apply and has refused to perform it sues in, respect of any subject which he had contracted to refer, the existence of such contract shall bar the suit.

The position, therefore, is that an agreement to refer a dispute to arbitration, if it falls under the Arbitration Act, is taken out altogether from the purview of the Specific Relief Act. The present case is one which is governed by the Arbitration Act.

Therefore, Section 21, Specific Relief Act, does not govern this case. We are now left with Section 34, Arbitration Act alone and we have to see what are the rights available to the respondents. As already stated, they did not avail of the remedy provided by that section but filed a written statement and went to trial. Since the respondents did not claim stay, there is no provision which in the present circumstances bars the suit. As already stated, the second clause of the exception to Section 28, Contract Act, has been deleted.

The court had, therefore, no option but to entertain this suit and under Section 44, Partnership Act, it was its duty to exercise a discretion as to whether or not it was a fit case in which dissolution could be allowed. The court has not applied its mind to that aspect of the case and has thrown out the suit as non-maintainable.

11. It is also argued by the learned counsel for the appellants that the right to sue for dissolution of partnership has been conferred on them by Section 44, Partnership Act, and that, therefore, it could not be controlled by any stipulation in the deed of partnership. We consider that this contention has force, but in view of the case reported in -- 'Smt. Dropadi v. Bankey Lal', AIR 1939 All 548 (A) and of the consideration that the appeal can be disposed of on another point, We do not express any final opinion on this contention.

12. There are certain provisions of the Act which confer rights on partners but make them subject to contract between them. They are to be found in Sections 12 to 17, Similarly, there are certain provisions, e.g., those contained in Section 19(2), which are subject to usage or custom of trade. But

Section 44 is not subject to any such limitation. The right conferred by this section on parties is absolute. Section 11 lays down that:

"Subject to the provisions of this Act, the mutual rights and duties of the partner of a firm may be determined by contract between the partners, and such contract may be express or may be implied by a course of dealing. Such contract may be varied by consent of all the partners, and such consent may be express or may be implied by a course of dealing."

It will follow from the language of this section that, while the partners can regulate their rights by mutual agreements, such agreements must remain subject to the provisions of the Act, including Section 44. If, therefore, there is anything in an agreement which takes away the right to sue for dissolution of partnership -- which right is conferred on a partner by Section 44 -- the agreement should give way to the clear provisions of Section 44. Such a view was expressed in the case reported in -- 'V. Venkataswami v. G. Venkataswami', AIR 1954 Mad 9 (B), which dissented from the aforesaid Allahabad case.

13. It may be mentioned that the learned Judges who decided the Allahabad case had this very partnership deed before them for consideration and the then suit, was also for dissolution of partnership. That decision was given, in 1939, i.e., before the enactment of the Arbitration Act.

But paragraph 18 of the Second Schedule of the Code of Civil Procedure was then in force and the attention of the learned Judges was not invited to that provision of law. We have gone through the judgment and we find no reference to paragraph 18 of the Second Schedule of the Code of Civil Procedure in it.

14. Learned counsel for the respondents further urged that the present suit would be barred in spite of Section 34, Arbitration Act, in view of the specific provision in paragraph 49 of the partnership agreement to the effect that a suit, if instituted, would be dismissed. We are of opinion that this contention has no force. Section 34 becomes applicable when there is an arbitration agreement and when a person who is a party to that agreement starts legal proceedings, These conditions are satisfied in the present case and there is no reason why the present arbitration agreement should go out of the purview of Section 34.

15. The learned counsel for the respondents cited four English cases, viz., -- 'Scott v. Avery', 1856-5 HLC 811 (C); -- 'Caledonian insurance Co. v. V. Gilmour', 1893 AC 85 (D); -- 'Cayzer, Irvin & Co., Ltd. v. Board of Trade', 1927-1 KB 269 (E) and -- 'Board of Trade v. Cayzer, Irvine & Co., Ltd.', 1927 AC 610 (F). The object of citing these cases was to prove that from the middle of the nineteenth century till at least 1927 the law in England was that a suit instituted in circumstances like the present would have been dismissed.

It is unnecessary to examine these cases because, even according to the law as it prevailed in India, a suit instituted in similar, circumstances would not, as pointed out above, have been maintainable till 1908. It was in that year that the legislature in India intervened and brought about a change in law.

Instead of making the suit totally non-maintainable, it gave an option to the defendant to have the plaintiff's suit stayed.

Because of this change introduced by the Indian legislature it is unnecessary to see what the state of affairs in England is. We are of opinion that the English rulings in general and Indian rulings prior to 1908 have no bearing on the question that is now before us.

16. Paragraph 17 of the partnership agreement is:

"It shall be the duty of the partner desiring to withdraw himself from the partnership of the factory to sell his share in the manner given below. In case the company is not in a position to purchase the said share or to have it sold in anyway the partner desiring separation shall have power to have the partnership dissolved and thus withdraw himself from the partnership."

Paragraph 18 lays down the procedure which should be followed by the partner desiring to withdraw himself for the purpose of enabling the company to effect a transfer of the share. It further provides:

"If the company fails to have it sold within three months the partner seeking separation or the partner making the sale shall have power to transfer his share to anyone."

It would appear, therefore, that the agreement of partnership does give a right to the partner, who desires to withdraw from partnership, to have the partnership dissolved if the company fails to purchase his share or to have it sold. It has been argued in the present case that the company failed in this respect. The plaintiff, therefore, had the right to have the partnership dissolved and such a right he could exercise by instituting a suit for dissolution of the partnership. An arbitrator could not have dissolved the partnership.

The utmost that he could do, if such a claim by the plaintiff was opposed by the other partners and the matter was referred to the arbitrator, was to have decided that the" plaintiff had the fight to get the partnership dissolved. He could not have dissolved the partnership. Dissolution of a firm is dealt with in Chapter VI, Partnership Act. A firm can be dissolved with the consent of all the partners or in accordance with a contract between the partners according to Section 40.

The decision of the arbitrator will not amount to a consent of all the partners. There is no specific term in the agreement of partnership that a decision by the arbitrator that the firm should be dissolved would lead to the dissolution of the firm. Sections 41 and 42 dealt with other circumstances which lead to the dissolution of a firm. Section 43 deals with the dissolution by notice of partnership at will. Section 44 is a general section providing for the dissolution by the court.

The present suit has been instituted by the plaintiff for the dissolution of the firm under Section 44 of the Act. In view of his having the power to have the partnership dissolved in accordance with the terms of paragraph 17 of the agreement of partnership, we see no reason why he cannot institute the

present suit.

17. In the circumstances, we have come to the conclusion that, as the law now stands, if a person, who has been a party to an arbitration agreement, brings a suit ignoring that agreement, the defendant's remedy, if he wants to rely on that agreement, is to proceed under Section 34, Arbitration Act, and to ask for stay of the suit. If he does not avail of that remedy, the court has jurisdiction to hear the suit and to give a decision on merits. The contention that the suit should fail cannot be upheld in the present state of law.

18. We have, therefore, come to the conclusion that the view taken by the learned Civil Judge was incorrect.

19. The appeal is allowed and the decree and judgment of the learned Civil Judge of Agra are set aside. The case shall be remanded to the said court with directions to re-admit it to its original number and to record a decision on merits. The appellants shall get the costs of this Court. The costs of the trial court shall be costs in the cause.

20. The Receiver appointed by this Court's order, dated 6-5-1955, shall continue in office for the duration of the suit, but any further application for direction or for removal of the Receiver or other matter in connection with the Receiver shall be made to the learned Civil Judge.

21. Under Section 13, Court Fees Act a certificate shall be prepared and delivered to the learned counsel for the appellants authorising him to receive back from the Collector the full amount; of court fee paid on the memorandum of appeal.

22. In view of the fact that a report by the Receiver is pending for orders, the record shall be sent back to the court below at a very early date.