

(2016) 03 KAR CK 0156

KARNATAKA HIGH COURT

Case No: Writ Petition No. 41609 of 2015 (GM-CPC).

Narasimha and Others -
Petitioners @HASH Manoj Kumar
S. and Others

APPELLANT

Vs

RESPONDENT

Date of Decision: March 21, 2016

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 8

Citation: (2016) 4 KantLJ 84

Hon'ble Judges: Budihal R.B., J.

Bench: Single Bench

Advocate: Sri Dhyan Chinnappa, Senior Counsel for Sri Karunakara P., Advocate, for the Petitioners; Sri Jayakumar S. Patil, Senior Counsel for Sri B.S. Sachin, Advocate, for the Respondents

Final Decision: Disposed Off

Judgement

@JUDGMENTTAG-ORDER

Mr. Budihal R.B., J. - This petition is filed by the petitioners-defendants requesting the Court to quash the order dated 2-5-2015 passed by the I Additional Senior Civil Judge, Mangalore on I.A. No. 3 in O.S. No. 102 of 2015, which is produced at Annexure-A.

2. I.A. No. 3 was filed on behalf of the petitioner-defendants before the Trial Court under Section 8 of Arbitration and Conciliation Act, 1996, praying that all further proceedings may be stayed and parties may be referred to arbitration for resolution of the dispute raised in the plaint. Said application is supported by the affidavit of the petitioner No. 1-defendant No. 1, wherein it is stated that petitioners-defendants were the partners of the firm by name "K.N.S.B. Palguni Textiles" initially as per the partnership dated 29-3-2003 and subsequently, as per the partnership deed dated

1-4-2006. They have retired from the above firm with effect from 11-7-2014.

Respondents-plaintiffs have filed the suit before the Trial Court seeking damages as well as restraint order restraining the petitioners-defendants from carrying on the business under the name and style of "Palguni Silks and Fabrics", which is presently being carried on by them at Ganapathi High School Road, Mangalore, on the ground that it amounts to breach of goodwill of original firm of "M/s. K.N.S.B. Palguni Textiles". It is further stated in the said affidavit at paragraph No. 6 that without admitting the correctness or legality of the plaint claim, the dispute raised by the respondents-plaintiffs related to erstwhile firm of "K.N.S.B. Palguni Textiles". As per the last of the partnership deed dated 1-4-2006 convening the above firm contains an Arbitration clause vide Clause No. 17 and the said clause is also narrated in the said affidavit. It is also mentioned that plaint dispute arise between them as retiring partners and respondents-plaintiffs as continuing partners of the erstwhile firm. Hence, such dispute is governed by Clause 11 of the Partnership Deed dated 1-4-2006. Hence, they have sought the relief under the said application I.A. No. 3.

The respondents-plaintiff opposed the said application by filing the objection statement on various grounds as mentioned in the objections at paragraphs 1 to 7 and sought for dismissal of the application.

After considering the merits in the said application, ultimately the Trial Court dismissed the application by passing the impugned order. Being aggrieved by the same, the petitioners-defendants are before this Court.

3. Learned Senior Counsel appearing on behalf of the petitioners-defendants during the course of arguments has submitted that the order of the Trial Court rejecting the application is patently illegal and not sustainable in law. Though earlier partnership was extinguished and it was substituted by the subsequent partnership deed dated 11-7-2014. He has submitted that the main allegation of the respondents-plaintiffs in the suit that defendants violated the terms and conditions in the earlier partnership deed with regard to restraint placed on the defendants using the firm name "M/s. K.N.S.B. Palguni Textiles" in carrying on the business after the retirement. Therefore, the plaintiffs have claimed the damages of Rs. 1.00 Crore so also injunctory relief restraining petitioners-defendants from using the firm's name to carry on their business. It is also submitted that the Trial Court while passing the order on LA. No. 3, wrongly interpreted that the prayer in the application I.A. No. 3 contains two parts, one is arbitral and another one is non-arbitral. It is also submitted that the said distinction made by the Trial Court is not correct. He has further submitted that the Arbitrator can consider about the claim and he can pass the award even with regard to the damages that were claimed by the plaintiffs in the said suit. Hence, he has submitted that particularly in trademark cases while awarding the damages, the Arbitrator is competent to assess the damages because of such infringement of trademarks and he can award the damages in the arbitration proceedings. Hence, he has contended that the said

reasoning of the Trial Court is not sustainable in law. With regard to the contention of the other side that the original or certified copy of the earlier agreement dated 1-4-2006 is not produced before the Court, hence, there is non-compliance of mandatory provisions of Section 8(2) of Arbitration and Conciliation Act, 1996, is not correct, learned Senior Counsel has submitted that looking to the list of documents produced by the respondents-plaintiffs themselves, the notarised copy of the earlier agreement is also produced before the Court so also the subsequent agreement, which was substituted in place of the earlier agreement. Hence, submitted that the object of producing such documents before the Courts is that the Courts should not be misled in considering the documents and when the plaintiffs themselves have produced the notarised copy in respect of the earlier deed, there is compliance of Section 8(2) of the Arbitration and Conciliation Act.

Learned Senior Counsel has further submitted that looking to the clauses in the subsequent agreement, particularly Clauses 16 and 18, they clearly show that the defendants are entitled to take assistance of Clauses 16 and 18 in the subsequent agreement and they are made applicable to the disputes between the parties. It is also his contention that the observation made by the Trial Court in this regard that the earlier partnership agreements were extinguished, therefore, the terms and conditions in the subsequently reconstituted deed of partnership cannot come to the aid and assistance of the petitioners-defendants is also not correct. In this connection, learned Senior Counsel drew the attention of this Court to the terms and conditions of the reconstituted partnership deed more particularly Clauses 16 and 18, which clauses read as under:

"16. It is hereby declared that, the retiring partners shall not have any right in the goodwill or firm name of the partnership firm. The firm name and style viz., "K.N.S.B. Palguni Textiles" shall exclusively belong to the firm and on the retirement, the retiring partners shall not have any right to claim any share of goodwill or the trade name of the firm and the trade name shall be the exclusive property of the continuing partners and the retiring partners shall only be entitled to the amount standing to their credit at the time of retirement and to interest at 8% from the date of retirement to the date of payment of the amounts due to them.

18. Any disputes and differences of opinion that may arise, amongst the partners either during the continuance of the firm or afterwards touching this deed of partnership, or any breach thereof shall be settled by arbitration in accordance with the provision of the Arbitration Act for the time being in force. The decision given thereunder shall be binding on all the partners."

Hence, he has submitted that this aspect of the matter is not properly appreciated by the Trial Court while considering the application filed by the petitioners-defendants before the Trial Court and the said application was wrongly rejected. In support of his contentions, learned Senior Counsel has relied upon the decision reported in:

(i) In the case of **Vipin Kumar Gadhok v. Ravinder Nath Khanna and others**, AIR 2007 SC (Supp.) 1889 : (2007) 10 SCC 623, relevant paragraphs 9 and 10.

(ii) In the case of **Chloro Controls India (Private) Limited v. Severn Trent Water Purification Inc. and others**, AIR 2012 SC (Supp.) 1017 : (2013) 1 SCC 641, relevant paragraphs 74 and 75.

(iii) Decision of the Hon'ble Apex Court dated 15-4-2011 rendered in Civil Appeal No. 5410 of 2002 in the case of **Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and Others**, AIR 2011 SC 2507 : (2011) 5 SCC 532 : 2011 AIR SCW 2764, relevant paragraphs 21 and 22.

(iv) Judgment of the Hon'ble Apex Court dated 28-5-2014 in Arbitration Petition No. 34 of 2013 in the case of **Swiss Timing Limited v. Organising Committee Commonwealth Games 2010**, (2014) 6 SCC 677, relevant paragraph 21.

Hence, learned Senior Counsel has submitted that petitioners have made out a case that the Trial Court ought to have allowed the application and referred the matter for arbitration and hence, submitted to allow the petition.

4. Per contra, learned Senior Counsel for respondents-plaintiffs during the course of his arguments has submitted that the writ petition is not maintainable mainly on the ground that there is non-compliance of mandatory requirements of Section 8(2) of the Arbitration and Conciliation Act. Petitioners-defendants when filed the application I.A. No. 3 before the Trial Court ought to have produced the original or certified copy of the earlier partnership agreement dated 1-4-2006 on which they are claiming the relief under I.A. No. 3, and said document was not produced before the Trial Court. Therefore, the question of considering the other merits of the matter does not arise at all. In this connection, learned Senior Counsel relied upon the following decisions:

(i) The decision of the Hon'ble Apex Court dated 4-1-2008 in the case of **Atul Singh v. Sunil Kumar Singh**, AIR 2008 SC 1016 : (2008) 2 SCC 602.

(ii) In the case of **N. Radhakrishnan v. Maestro Engineers and others**, (2010) 1 SCC 72, relevant paragraphs 27, 28 and 29.

(iii) In the case of **India Lease Development Limited, New Delhi and another v. Thimmakka**, 2002 (5) Kar. L.J. 551 : AIR 2003 Kant. 97 : ILR 2002 Kar. 4583.

Hence, it is the first and foremost contention of the learned Senior Counsel that as per the principles enunciated in the said decision and as there is no compliance of the mandatory requirements of Section 8(2) of the Arbitration and Conciliation Act, the petitioners cannot maintain the petition. The other contention of the learned Senior Counsel is that looking to the application I.A. No. 3, petitioners are claiming the relief on the basis of the partnership deed dated 1-4-2006, in this connection, he drew the attention of this Court to paragraph No. 7 of the affidavit supporting the

application and submitted that when the relief is claimed on the basis of the partnership deed dated 1-4-2006 mentioning that the dispute is governed by Clause 11 of the partnership deed dated 1-4-2006, the said document itself is not produced before the Court. It is also his contention that so far as the earlier partnership deeds are concerned, accounts are settled and no dispute remained between the parties while constituting subsequent partnership deed dated 11-7-2014. Hence, he has submitted that even according to the application filed by the other side they were claiming the relief under the partnership deed dated 1-4-2006 and not under the subsequently reconstituted deed. Hence, the Trial Court has rightly appreciated that the defendants cannot invoke the terms and conditions in the reconstituted partnership deed dated 11-7-2014, as they have already retired from the partnership firm and rightly rejected the application of the petitioners-defendants. Hence, he has submitted that the Trial Court taken into consideration all the contentions raised by applicant in his application and considering all the merits of the case, ultimately, rejected the application I.A. No. 3. No illegality had been committed by the Trial Court in coming to such conclusion nor there is any perverse or capricious view taken by the Trial Court in passing the impugned order. Hence, he has submitted that there is no merit in this petition and accordingly same is to be rejected.

5. I have perused the grounds urged in the petition, impugned order passed by the Trial Court, application I.A. No. 3 with supporting affidavit and the objection statement filed by the respondents-plaintiffs to the said application and also perused the other documents produced i.e., reconstituted partnership deed dated 11-7-2014, regarding the first and foremost contention of the respondent-plaintiff about non-compliance of mandatory requirement of Section 8(2) of the Arbitration and Conciliation Act, I have perused the principles enunciated in the decisions, which are referred above. Looking to the principles in the said decisions their Lordships of the Hon"ble Apex Court as well as this Court have held that when the party is filing such application seeking the relief of referring the matter for arbitration, he has to produce the original or certified copy of the agreement or the deed on which he relies. But, admittedly, in this case, neither the original nor the certified copy of the deed dated 1-4-2006 had been produced by the petitioners-defendants while filing the application before the Trial Court. No doubt, it is contended by the learned Senior Counsel for the petitioners-defendants that notarised copy had been produced by the other side themselves, therefore, there is compliance of mandatory requirement. But in the decision relied upon by the learned Senior Counsel for respondents-plaintiffs, it is specifically mentioned by their Lordships that petitioner should file the original or the certified copy of the agreement or the deed along with the petition filed by him, then only there is compliance of Section 8(2) of the Act, therefore, looking to these contentions regarding the production of original or certified copy of the partnership deed dated 1-4-2006, it cannot be said that the petitioners have complied with the mandatory

requirements of the Section 8(2) of the Act.

6. With regard to the relief claimed in I.A. No. 3, though it is argued by the learned Senior Counsel for the petitioners-defendants that the terms and conditions in the reconstituted partnership deed can be invoked by defendants in claiming the relief under I.A. No. 3, which they have filed before the Trial Court to consider their application, it is very specific in the affidavit, which was sworn in support of the said application both in paragraphs Nos. 6 and 7, it is contended by the applicant-defendant that as per the last of partnership deed dated 1-4-2006 convening the above firm contains an arbitration clause vide Clause No. 17, Clause No. 17 inter alia states that: "any disputes and differences of opinion that may arise, amongst the partners either during the continuance of the firm or afterwards touching this deed of partnership or any breach thereto shall be settled by arbitration in accordance with the provisions of the Arbitration Act for the time being in force. The decision given thereunder shall be binding on all the partners".

In paragraph No. 7 of the said affidavit, it is stated that "I say that the plaintiff disputes arise between us as retiring partners and opponents/plaintiffs as continuing partners of the erstwhile firm. Hence, such dispute is governed by Clause 11 of the partnership deed dated 1-4-2006.

In view of the specific reference in the affidavit supporting the application, the applicant himself admitted that as per the earlier deed dated 1-4-2006, he is entitled for the relief under I.A. No. 3, regarding this aspect of the matter, the Trial Court has rightly appreciated that the partnership deed dated 1-4-2006 had been cancelled or superseded by the reconstituted partnership deed dated 11-7-2014. Therefore, the Trial Court held that as the defendants have already retired from the partnership firm, they cannot take the aid and assistance of the subsequently reconstituted partnership deed dated 11-7-2014. This observation made by the Trial Court is not contrary to what had been contended by the learned Senior Counsel for the petitioners herein. Therefore, even considering the merits of this aspect also, the Trial Court is justified in observing that the terms and conditions of the reconstituted partnership deed will not come to the aid and assistance of the petitioners-defendants in seeking the relief under I.A. No. 3.

7. Considering these aspects of the matter, I am of the clear opinion that the Trial Court considered and appreciated the contentions of both sides in accordance with law and rightly came to the conclusion that there is no merit in the application I.A. No. 3 and ultimately rejected the said application. Hence, I do not find any illegality in the impugned order passed by the Trial Court to interfere into the said order in this petition. Accordingly, petition is hereby dismissed.

8. At this stage, learned Senior Counsel for the petitioners-defendants has submitted that liberty may be given to the petitioner to make appropriate application before the Trial Court.

9. In view of the said submission, the petitioners-defendants are at liberty to file the fresh application, if permissible under law, and in case, if such application is filed, the Trial Court has to consider it on merits and dispose of the same in accordance with the merits as per the reconstituted partnership deed dated 11-7-2014.