
Ram Chandra Parolia Vs Bishwanath Parolia

C.O. No. 808 of 2014

Court: Calcutta High Court

Date of Decision: June 25, 2014

Acts Referred:

Arbitration and Conciliation Act, 1996 " Section 45, 8#Civil Procedure Code, 1908 (CPC) " Order 7 Rule 11#Constitution of India, 1950 " Article 227#Criminal Procedure Code, 1973 (CrPC) " Section 156(3)

Hon'ble Judges: Debabrata Mookerjee, J

Bench: Single Bench

Advocate: Rabindra Nath Mahato, Mr. Sukanta Chakraborty and Mr. S. Banerjee, Advocate for the Appellant; Yeasin Ali and Ms. Mamata Khatoon, Advocate for the Respondent

Judgement

Debangsu Basak, J.

A petition u/s 8 of the Arbitration and Conciliation Act, 1996 was allowed by the order impugned.

2. The petitioner filed a suit for declaration and injunction against the opposite parties. The petitioner claimed himself to be a partner having 40 per

cent share in a partnership firm duly registered under the Indian Partnership Act, 1932. In paragraphs 5 and 6 of the plaint the petitioner claimed

that the various terms and conditions of the deed of partnership were tempered with by the opposite parties. In the suit filed by the petitioner, he

prayed for a decree for declaration that the petitioner was entitled to enjoy and utilize 40 per cent share of the partnership firm for his warehousing

and other business and that the opposite parties had no right to hinder such business. The opposite parties applied u/s 8 of the Arbitration and

Conciliation Act, 1996 since according to the opposite parties the deed of partnership dated July 3, 1980 contained a clause for arbitration. By the

judgment and order impugned such petition of the opposite parties was allowed.

3. It was contended on behalf of the petitioner that the suit was for declaration and injunction. Pleadings made in paragraphs 4, 5, 10 and 11 of the

plaint as well as prayer (a) thereof was placed. It was contended that the business spoken off in the plaint was an independent business not

covered by the arbitration agreement contained in the deed of partnership dated July 3, 1980. It was next contended on behalf of the petitioner

that, the petitioner as the plaintiff had filed a previous suit where the opposite parties applied u/s 8 of the Arbitration and Conciliation Act, 1996.

Such petition of the opposite parties was rejected. The rejection of such petition was challenged by the opposite parties by way of a revisional

application being C.O. No. 2880 of 2011. By a judgment and order dated August 22, 2013 such revisional application was dismissed. This

Hon"ble Court was pleased not to find any infirmity in the order rejecting the petition under Order 7 Rule 11 of the Code of Civil Procedure, 1908

read with Section 8 of the Arbitration and Conciliation Act, 1996. The judgment and order dated August 22, 2013 was not considered by the

Trial Judge while delivering the impugned order.

4. On behalf of the opposite parties it was contended that, the parties of two suits were different. The suit properties in the two suits were also

different. The issues raised in the two suits were different. In the first suit in which the judgment and order dated August 22, 2013 was rendered the

claim of the petitioner was based on the deed of partnership.

5. Placing reliance on N. Radhakrishnan Vs. Maestro Engineers and Others, it was contended on behalf of the opposite parties that, the opposite

parties as the defendants were the only persons who were entitled to state that in view of the allegations of fraud they did not want arbitration. In

the instant case the opposite parties as defendants were applying for reference in terms of arbitration clause. It was contended that merely because

the petitioner as the plaintiff pleaded fraud in the plaint a reference to arbitration where there was an existing arbitration agreement covering the

subject disputes could not be denied. It was next contended on behalf of the opposite parties that the plaint did not disclose any fraud alleged to be

committed. Moreover, the plaint case disclosed that the basis of the claim of the petitioner as the plaintiff in the suit was the arbitration agreement

dated July 2, 1990. The foundation of the case of the petitioner as the plaintiff being the deed of partnership which contained the arbitration

agreement, there was no justification in not referring the disputes between the parties to arbitration.

6. Reliance was placed on All India Reporter World Sport Group (Mauritius) Ltd. Vs. MSM Satellite (Singapore) Pte. Ltd., to contend that, it

was for the arbitrator to adjudicate the disputes between the parties even if allegations of fraud were made. It was submitted on behalf of the

opposite parties that the impugned order did not suffer from any material irregularity and, therefore, did not warrant any interference under Article

227 of the Constitution of India.

7. The rival contentions of the parties and the material on record including the order impugned were considered by me. In the present suit the

petitioner as the plaintiff was claiming that he was carrying on the business of the partnership firm since he had 40 per cent share in such partnership

firm and since the opposite parties were not carrying on such business. The petitioner in the suit prayed for a decree of declaration that he was

entitled to enjoy and utilize 40 per cent share of the partnership firm.

8. In the plaint filed by the petitioner it was claimed that, the opposite parties had allegedly tampered with the various terms and conditions of the

deed of partnership. The petitioner also stated that he had filed a complaint u/s 156(3) of the Criminal Procedure Code in respect of such alleged

tampering.

9. The petitioner had filed a previous suit being Title Suit No. 121 of 2009. The petitioner was the plaintiff in such title suit. The partnership firm

was one of the defendants, so were the opposite parties herein. In such suit the opposite parties applied for rejection of the plaint under Order 7

Rule 11 of the Code of Civil Procedure, 1908 read with Section 8 of the Arbitration and Conciliation Act, 1996. After contested hearing the

learned Trial Court rejected such application. The order of rejection passed by the Trial Court dated May 3, 2010 in Title Suit No. 121 of 2009

was challenged under Article 227 of the Constitution of India by a revisional application being C.O. No. 2880 of 2011. By a judgment and order

dated August 22, 2013 such revisional application was dismissed. N. Radhakrishnan (supra) was cited before the Court dealing with the revisional

application. It was held that, there were serious allegations of fraud made by the petitioner. The Court was of the opinion that it was not a fit case

for referring the matter to the arbitrator for arbitration in view of the ratio of N. Radhakrishnan (supra) despite the arbitration clause in the deed of

partnership.

10. The subject matter of the present suit related to the same partnership firm constituted by the same deed of partnership obviously containing the

same arbitration agreement. The petitioner as the plaintiff claimed the right to carry on the business and also sought a declaration that the opposite

parties as defendants were not entitled to hinder the petitioner's carriage of such business. In the instant suit also allegations were made with regard

to the tampering of the deed of partnership. N. Radhakrishnan (supra) was cited and considered in C.O. No. 2880 of 2011. It would be improper

for me to accept the interpretation of N. Radhakrishnan (supra) as sought to be advanced on behalf of the opposite parties in the facts of this case.

11. Therefore, following the judgment and order dated August 22, 2013 passed in C.O. No. 2880 of 2011, I am of the view that, the petition u/s

8 of the Arbitration and Conciliation Act, 1996 was liable to be rejected.

12. In World Sport Group (Mauritius) Ltd. (supra) the Supreme Court was concerned with a suit filed for declaration claiming that a Facilitation

Deed was void and for recovery of money. The Facilitation Deed contained an arbitration clause for referring the disputes to ICC, Singapore.

ICC, Singapore had issued a notice to the plaintiff in such suit to file its answer to the request for arbitration. The plaintiff, thereafter, filed a second

suit seeking a declaration that the Facilitation Deed stood rescinded and that the defendant of such suit was not entitled to invoke the arbitration

clause in the Facilitation Deed. An application for injunction was made. The learned Single Judge dismissed the application for injunction. On

appeal the Division Bench allowed the appeal and set aside the order of the learned Single Judge and passed an order of temporary injunction.

That gave rise to the SLP before the Supreme Court. Their Lordships of the Supreme Court were of the view that the arbitration agreement did

not become inoperative and or incapable of being performed where allegations of fraud were required to be inquired into. Their lordships held that,

a Court cannot refuse to refer the parties to arbitration in terms and conditions of the Arbitration and Conciliation Act, 1996 on the ground that

allegations of fraud have been made by the parties which ought not to be tried by the arbitrator. N. Radhakrishnan (supra) was one of the

judgments considered by the Hon"ble Court. It was pointed out that N. Radhakrishnan (supra) was a decision rendered in the context of domestic

arbitration and not in the context of international arbitration under the provisions to which Section 45 of the Arbitration and Conciliation Act

applied. In the case of arbitration covered by the New York convention the Court may decline to make a reference of a dispute covered by the

arbitration agreement only if it came to the finding that the arbitration agreement was null and void, inoperative or incapable of being performed and

not on the ground that allegations or misrepresentation have to be inquired into while deciding the issues between the parties. The instant case

revolved around whether or not to refer the parties to a domestic arbitration. The ratio of the judgment of World Sport Group (Mauritius) Ltd.

(supra) was, therefore, not applicable.

13. One more aspect of the disputes between the parties required consideration. There were two suits pending between the parties. The plaintiffs

as the opposite parties were litigating in both the suits. In the first suit one additional party being the partnership firm was a party to such suit. Both

the suits, therefore, were essentially between the natural persons involved in the present suit.

14. The opposite parties contended that the parties to the suits were different. Numerically one extra party was present in the previous suit. Such

extra party was a partnership firm. The parties to the instant suit were the partners of the partnership firm. Apart from the partnership firm all the

three partners were parties to both the suits. It was also contended that the suit properties in the two suits were different and that the issues raised

therein were different. In the earlier suit the same deed of partnership containing the same arbitration clause was taken up for consideration and the

question as to whether the disputes involved in such previous suit was required to be referred to arbitration in terms of the arbitration agreement

contained in the deed of partnership was negated upto the Revisional Court level.

15. In the earlier suit it was held that, the parties must settle their disputes through Court and not by way of an arbitration. In such circumstances it

would be prudent not to refer the parties to the present suit to arbitration as prayed for by the opposite parties.

16. In such circumstances the impugned order dated January 17, 2014 passed in Title Suit No. 29 of 2011 is set aside. The petition dated March

11, 2011 of the opposite parties u/s 8 of the Arbitration and Conciliation Act, 1996 is dismissed.

17. Accordingly, C.O. No. 808 of 2014 is allowed. There will be no order as to costs.

18. Urgent Xerox certified copy of this judgment, if applied for, be given to the parties on priority basis.