

SUPREME COURT OF INDIA

Vishnu Tulsidas Sipahimalani

Vs.

Kanta Suresh Sipahimalani

C.A.No.835 of 2000

(S. B. Majmudar and D. P. Mohapatra, JJ.)

04.02.2000

JUDGEMENT

S. B. MAJMUDAR, J.:-

1. Leave granted.
2. We have heard the appellant in person and learned counsel for the respondent.
3. This appeal arises from the common judgment and order of the High Court in two arbitration petitions whereunder it has been found that the prayer for supercession of the arbitrator as moved by the present appellant could not be granted. Thus the Arbitration Petition No. 242 of 1997 filed by the appellant was rejected by the High Court, but the cross-Arbitration Petition No. 239 of 1997 which was filed by the respondent for extension of time to be granted to the arbitrator to make the award was granted.

4. A few facts leading to this appeal may be noted at the outset.

On 20th October, 1985, a Deed of Partnership was executed between the parties and one Rajan Tulsidas Sipahimalani, to carry on business of running a Restaurant. The business was carried on in the name of M/s. Cactus Restaurant and Bar, situated at Shanti Centre, Sector 17, Vashi, New Bombay. Subsequently, Rajan Tulsidas Sipahimalani retired from the partnership and business was continued by the present parties. In connection with the said business, dispute arose and, therefore, it appears that the appellant filed Special Civil Suit No. 658 of 1990 in the Court of Civil Judge, Senior Division, Thane, for a declaration that the partnership stood dissolved with effect from 22nd October, 1990. On the first day of the hearing of the said suit, the respondent appeared and filed an application under Section 34 of the Indian Arbitration Act, 1940 invoking arbitration clause and asking for stay of the suit. The learned Joint Civil Judge, Senior Division, Thane, allowed the application of the respondent for stay of the suit on 25th September, 1992. Against that order, Writ Petition No. 1322 of 1993 was filed in the High Court by the appellant, but the petition came to be dismissed.

5. As per arbitration clause in the agreement of partnership, each party was to appoint Arbitrator of his or her choice. Accordingly, the respondent nominated Mr. Justice M. N. Chandurkar, retired Chief Justice of the Madras High Court as her Arbitrator and the appellant was called upon to nominate his Arbitrator. He nominated one Mr. P. D. Desai as his Arbitrator but as his particulars were not supplied, the said Arbitrator could not be contacted. Under these circumstances, respondent filed Arbitration Petition No. 89 of 1993 under Section 8 of the Indian Arbitration Act, 1940. In that Arbitration petition, Justice Dhanuka of the High Court on 28-6-1993 appointed Mr. M. N. Chandurkar as sole Arbitrator. However, subsequently, Justice Chandurkar withdrew from the arbitration. Thereafter, the appellant filed Arbitration Petition No. 94 of 1996 for appointment of Arbitrator and in the Petition he made an application for appointment of the Receiver etc. That petition came to be decided by Mrs. Justice Baam on 4th June, 1996 and by order she rejected the prayer of the appellant for appointment of Receiver, but as regards appointment of Arbitrator, Justice Lentin, retired Judge of the Bombay High Court came to be appointed as sole arbitrator and four months time was specified for making the award from the date of entering upon reference.

6. It appears that Justice Lentin also subsequently refused to act as Arbitrator. Thereafter, the appellant filed another Arbitration Petition No. 213 of 1996 for appointment of the Arbitrators and thereafter, on the Minutes of the order signed by the Parties, Mr. Justice Jhunjhunwala of the Bombay High Court disposed of the petition by his order in terms of the minutes and appointed Justice Pendse, retired Chief Justice of the Karnataka High Court and Mr. M. N. Dama as Arbitrators. It appears that though the arbitration proceedings went on for some time both the learned Arbitrators resigned their respective assignments. Even though the time period for making the award was extended by the Court till the end of August 1997, the award could not be made. It is under these circumstances the respondent filed Arbitration Petition No. 239 of 1997 in the High Court for extension of further time for making and publishing the award till 30th June 1998, or in

the alternate, the Court may appoint Justice Pendse as a sole Arbitrator. The appellant, on the other hand, filed Arbitration Petition No. 242 of 1997 praying for rescinding the arbitration as arbitration had failed. It may be noted that the appellant is a practising Advocate and was a sleeping partner in the partnership in question, while the respondent is his sister-in-law, namely, wife of his brother. By the impugned order, the High Court rejected the appellant's Arbitration Petition No. 242 of 1997, as noted earlier, but cross-Arbitration Petition No. 239 of 1997 moved by the respondent for extension of time was granted. It is this common order which was brought in challenge by the appellant party in person in the Special Leave Petition.

7. By an order dated 7-4-1998, a notice was issued in the Special Leave Petition. Pursuant to the said notice, the respondent appeared through her counsel. As the appellant and the respondent are near relations, we tried to explore the possibility of settlement especially, in view of the fact that the arbitration proceedings have dragged on for years and the suit is also pending since 1990 in the Thane Court.

8. The appellant submitted before us that as the arbitration has failed and number of arbitrators have come and gone without rendering any decision his suit may be expedited and his application for appointment of Receiver be permitted to be considered by the trial Court; as according to him, the partnership at will had stood dissolved by notices exchanged between the parties.

9. After hearing the appellant in person and learned counsel for the respondent at SLP stage pursuant to the notice in these proceedings, an interim order was passed on 20-7-1999 on consensus of the parties. In our view, this consensus was rightly reached as the dispute between the parties remained simmering for almost 10 years and number of arbitrators, being retired Judges and Chief Justices of the High Courts, could not complete arbitration and resolve the dispute between the parties. We may not go into the question as to by whose default arbitration proceedings could not be successfully completed. Be that as it may, on the peculiar facts of this case, therefore, we felt that it was high time that parties may proceed with the suit so that appropriate orders can be passed by the Court especially, when arbitration proceedings had failed to deliver the goods for both of them.

10. Under these circumstances, on consensus of the parties by our order dated 20-7-1999, as noted earlier, we requested Shri N.H. Seervai Advocate to act as Court Receiver on a monthly remuneration and for discharging various functions as noted in the said order.

11. Unfortunately, Shri Seervai expressed his inability to act as Receiver. Consequently, by later order dated 29-10-1999, the order dated 20-7-1999 was modified after hearing the appellant in person and learned counsel for the respondent and we directed the learned Civil Judge (Senior Division), Thane, before whom the suit for accounts is pending between the parties, to appoint appropriate Receiver in the light of our order dated 20-7-1999 in place of Shri Seervai. The remuneration of the Receiver and other suitable directions to be issued by him were left to be

decided upon by the trial Court. After the order, the Special Leave Petition was ordered to be placed on 21-1-2000 and that is how it was placed before us on 21-1-2000. In the meantime, I.A. No. 1 of 1999 is filed by the respondent, while unnumbered I.A. of 2000, which may be treated as I.A. No. 2, is filed by the appellant. It has been brought to our notice by both sides that by order dated 20-11-1999, the learned Civil Judge (Senior Division), Thane before whom Special Civil Suit No. 658 of 1990 is pending, has passed an order appointing Shri M.R. Vaidya, Advocate as Court Receiver and directions given by us on 20-7-1999 and as modified by later order dated 29-10-1999 have been issued to the Receiver for due compliance. However, both sides have raised certain grievances in connection with the working of the Court Receiver and/or alleged non-compliance of the directions issued to the Court Receiver by us and also as reaffirmed by the Trial Court and also alleged non-compliance of our directions issued by the respondent.

12. Now a stage has reached where these proceedings can be disposed of leaving further monitoring of the working of the Court Receiver by the Trial Court. We, therefore, pass the following order after hearing the appellant in person and learned counsel for the respondent.

(i) The impugned order of the High Court passed in the Arbitration Petition No. 242 of 1997 is set aside. Reference to arbitration will stand rescinded. The order passed by the Trial Court staying the Special Civil Suit No. 658 of 1990 in application filed by the appellant under Section 34 of the Arbitration Act, 1940 will stand vacated. As the arbitration has been rescinded the aforesaid Civil Suit pending in the Court of the learned Judge will now proceed further in accordance with law.

(ii) The Court Receiver appointed by the trial Court by order dated 20-11-1999 will now be treated to be the Receiver appointed by the trial Court itself by its aforesaid order incorporating various directions issued by us earlier on 20-7-1999 and as modified by later order dated 29-10-1999. It will be open for the trial Court to see that its directions are fully complied with by the respective parties concerned and the grievance of the parties in connection therewith will have to be examined and appropriate orders to be passed thereon by the trial Court itself. Accordingly, suitable directions will be issued by the Trial Court to the Court Receiver Shri M.R. Vaidya.

(iii) Copies of both I.A. 1 and 2 filed before us in this appeal will be sent by the Officer to the trial Court. It will be open to the trial Court to consider these I.As. on their own merits and pass appropriate orders and directions to the Receiver as required by treating them as applications of respective parties in connection with the working of the Court Receiver. All future working of the Court Receiver and monitoring of his work will now be entirely within the jurisdiction of the trial Court itself without further reference to this Court.

(iv) The Court Receiver appointed by the Civil Judge (Senior Division), Thane will thus be treated to be appointed by the Trial Court under Order 40, Rule 1 of the Code of Civil Procedure. It will be open to the Trial Court, after hearing the respective parties, to pass from time to time further

appropriate orders in connection with the working of the Court Receiver and regulating even the working of the agent of the Court Receiver. It will also be open to the Trial Court to consider the feasibility of continuing respondent as agent of the Receiver after hearing the parties, if found necessary. In this connection, it may also pass appropriate orders. Our earlier directions in this connection will not come in the way of the trial Court in passing appropriate orders. In short, all the questions pertaining to the working of the Court Receiver Shri M.R. Vaidya will be decided by the Trial Court after hearing the parties and in accordance with law.

13. As further monitoring of the work of the Court Receiver is to be within the jurisdiction of the trial Court, it will not be necessary for us to continue these proceedings any further. It goes without saying that if in future any of the parties will have any grievance in connection with the orders that may be passed by the Trial Court, the same grievance can be ventilated higher up in accordance with law. In view of our present order setting aside the order of the High Court in the Arbitration Petition No. 242 of 1997, the consequential order passed by the High Court in the Arbitration Petition No. 239 of 1997 of extending time to the arbitrator to give award will not survive and will stand vacated as the very reference to arbitration has stood rescinded as directed by us. The Appeal is allowed accordingly with no order as to costs. We make it clear that we express no opinion on the merits of the controversy between the parties. It will be for the Trial Court to pass appropriate orders in accordance with law after hearing the parties.

Appeal allowed.