

VIJAY KUMAR SHARMA @ MANJU
v.
RAGHUNANDAN SHARMA @ BABURAM & ORS.
(Civil Appeal No. 89 of 2010)

JANUARY 5, 2010

[R.V. Raveendran and K.S. Radhakrishnan, JJ.]
2010 (1) SCR 582

The Order of the Court was delivered by

ORDER

R.V. RAVEENDRAN, J. 1. Leave granted. Heard the learned counsel.

2. The first respondent and appellant are brothers. The first respondent filed a suit (Civil Suit No.100 of 2006) against the appellant alleging that their father Durganarayan Sharma died on 20.10.2005 leaving a will dated 21.10.2003 bequeathing portions of property bearing No.B-133, Bapu Nagar, Jaipur (for short the suit premises) to him, and that the appellant who was in possession of the said portions, was liable to deliver possession thereof to the first respondent on the basis of the said will. The Executors of the said will were impleaded as defendants 2 and 3 (respondents 2 and 3 herein).

3. The appellant herein, in turn filed a Civil Suit No.53 of 2007 for partition and separate possession of his one-sixth share in the ancestral properties. He also sought a declaration that the will dated 21.10.2003 propounded by the first respondent was fabricated, null and void. In the said partition suit, first respondent and his son were impleaded as defendants 1 and 6; appellant's another brother and three sisters were impleaded as defendants 2 to 5; the son of another brother who had been given away in adoption was impleaded as defendant no.7; and the executors under the will were impleaded as defendants 8 and 9.

4. The two suits were consolidated for trial. Respondents 2 and 3 claiming to be the executors of the will of Durganarayan Sharma filed an application

under section 8 of the Arbitration & Conciliation Act, 1996 ('Act' for short) in the said suits alleging that the deceased Durganarayan Sharma had made a declaration on 15.10.2005, shortly before his death, that if there was any dispute in connection with the will, the same should be decided by Shri U.N. Bhandari, Advocate; that the parties to the two suits being children and grandchildren of Durganarayan Sharma were bound by the said declaration and the disputes which were the subject matter of the two suits should therefore be decided by arbitration. The trial court heard the said application and by order dated 19.9.12007, held that in view of the said provision for resolution of disputes by arbitration, its jurisdiction was barred by the provisions of the Act. Consequently, the trial court dismissed both the suits, under Order 7 rule 11 of the Code of Civil Procedure ('Code' for short).

5. Feeling aggrieved by the order dated 19.9.2007, the appellant herein filed an appeal (SB Civil Appeal No.664 of 2007) contending that there was no agreement for arbitration and that there was no ground for dismissal of his suit and a Division Bench of the High Court, while issuing notice to show cause why the appeal should not be admitted, stayed the order dated 19.9.2007 passed by the trial court, by order dated 14.11.2007.

6. The first respondent accepted the decision of the trial court and filed a claim statement on 20.10.2007 before Shri U.N. Bhandari, the sole Arbitrator named in the declarations of his father, the reliefs earlier sought by him in Civil Suit No. 100/2006. The said U.N. Bhandari issued notices to the appellant and other non-petitioners in the claim. The appellant appeared before Shri U.N. Bhandari, and objected to his jurisdiction to act as an arbitrator, contending that there was no arbitration agreement between the parties. He also pointed out that neither he nor first respondent had signed the declaration of his father giving consent to Shri U.N. Bhandari being the Arbitrator. He also brought to the notice of Shri Bhandari, that the order dated 19.9.2007 passed by the trial court had been stayed by the High Court. He also challenged the continuation of Shri Bhandari as an arbitrator by alleging

bias against him. In these circumstances on 17.11.2007, Shri Bhandari withdrew himself from the arbitrator. On such withdrawal, the first respondent filed an application under section 11(6) read with section 14(1)(b) and 15(2) of the Act for appointment of an independent arbitrator. The designate of the Chief Justice who heard the matter, allowed the said application by the impugned order dated 16.5.2008, and appointed an Arbitrator to resolve the disputes. The said order is challenged in this appeal by special leave.

7. The first contention raised by the appellant is that when the question (whether there is a valid arbitration agreement between the appellant and first respondent) is pending consideration by the High Court in S.B. Civil First Appeal No.664 of 2007, the designate of the Chief Justice could not have entertained or decided an application under Sections 11, 14 and 15 of the Act involving the same question. It is submitted that the order of the trial court dated 19.9.2007 holding that the parties should resolve their disputes by arbitration had been stayed by the High Court in the pending appeal. In view of the pendency of S.B. Civil first Appal No.664 of 2007 and the interim stay of the order dated 19.9.2007, granted by the High Court on 14.11.2007, the appellant submitted that the learned designate of the Chief Justice ought not to have proceeded to decide the application for appointment of a fresh arbitrator, but ought to have awaited the decision in the first appeal. It was submitted that in the pending first appeal (against the decision dismissing his suit under Order 7 Rule 11 of the Code), if it is held that there is no arbitration agreement between the parties or if the court refuses to refer the parties to arbitration, the suits will have to proceed and that will lead to conflicting decisions.

8. Section 8 of the Act which is relevant is extracted below:

“8. Power to refer parties to arbitration where there is an arbitration agreement. – (1) A juridical authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party

so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.”

9. It is evident from sub-section (3) of section 8 that the pendency of an application under section 8 before any court will not come in the way of an arbitration being commenced or continued and an arbitral award being made. The obvious intention of this provision is that neither the filing of any suit by any party to the arbitration agreement nor any application being made by the other party under section 8 to the court, should obstruct or preclude a party from initiating any proceedings for appointment of an arbitrator or proceeding with the arbitration before the Arbitral Tribunal. Having regard to the specific provision in section 8(3) providing that the pendency of an application under section 8(1) will not come in the way of an arbitration being commenced or continued, we are of the view that an application under section 11 or section 15(2) of the Act, for appointment of an arbitrator, will not be barred by pendency of an application under Section 8 of the Act in any suit, nor will the Designate of the Chief Justice be precluded from considering and disposing of an application under Section 11 or 15(2) of the Act. It follows that if an arbitrator is appointed by the Designate of the Chief Justice under section 11 of the Act, nothing prevents the arbitrator from proceeding with the arbitration. It also therefore follows that the mere fact that an appeal from an order dismissing the suit under Order 7 Rule 11 CPC (on the ground that the disputes require to be settled by Arbitration) is pending before the High Court, will not come in the way of the appointment of an arbitrator under section 11

read with section 15(2) of the Act, if the Authority under section 11 finds it necessary to appoint an Arbitrator. Therefore the first contention of the appellant is liable to be rejected.

10. The appellant next contended that the parties to the dispute have not entered into an arbitration agreement, there is no arbitration agreement in existence as contemplated under section 7 of the Act, and the Authority under section 11 of the Act was not justified in appointing an arbitrator.

11. The learned Designate held that an arbitration agreement need not be signed by the parties and if a provision for arbitration is incorporated by a Testator in his Will, such a provision will be binding on his children/legatees, after his death. He held that a provision in a Will providing for arbitration, in the event of a dispute among the legatees, is an arbitration agreement under section 7 of the Act, for the purposes deciding any disputes among the legatees. He relied upon a decision of the Calcutta High Court in *Raj Kumar v. Shiva Prasad Gupta* - [AIR 1939 Cal. 500] where it was observed that a father has the power to refer to arbitration the disputes relating to a joint family property, provided such reference was for the benefit of the family, and that an award made by an arbitrator upon such reference, will be binding upon all members of the family, including any minors.

12. We are of the view that the said decision has no relevance to the question on hand and at all events, is not of any assistance to determine whether there was any arbitration agreement, as contemplated under section 7 of the Act. Section 7 defines 'arbitration agreement' as meaning an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. Sub-sections (2) and (3) of section 7 require that an arbitration agreement shall be in writing (whether it is in the form of an arbitration clause in a contract or in the form of a separate agreement). Sub-section (4) of section 7 enumerating the circumstances in

which an arbitration agreement will be considered as being in writing, is extracted below:

“7(4). An arbitration agreement is in writing if it is contained in -

- (a) a document signed by the parties;
- (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
- (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

13. In this case, admittedly, there is no document signed by the parties to the dispute, nor any exchange of letters, telex, telegrams (or other means of telecommunication) referring to or recording an arbitration agreement between the parties. It is also not in dispute that there is no exchange of statement of claims or defence where the allegation of existence of an arbitration agreement by one party is not denied by the other. In other words, there is no arbitration agreement as defined in section 7 between the parties. In *Jagdish Chander vs. Ramesh Chander* – 2007 (5) SCC 519, this Court held:

“The existence of an arbitration agreement as defined under section 7 of the Act is a condition precedent for exercise of power to appoint an arbitrator/Arbitral Tribunal, under section 11 of the Act by the chief Justice or his designate. It is not permissible to appoint an arbitrator to adjudicate the disputes between the parties, in the absence of an arbitration agreement of mutual consent.”

14. While the respondents rely upon the Will, the appellant denies the existence of any such Will. The validity of the Will is pending consideration in the two civil suits filed by the appellant and the first respondent, referred to above. The alleged Will, admittedly, does not contain any provision for arbitration, though the learned Designate has proceeded on an erroneous

assumption that the Will provides for arbitration. Even if the Will had provided for reference of disputes to arbitration, it would be merely an expression of a wish by the testator that the disputes should be settled by arbitration and cannot be considered as an Arbitration agreement among the legatees. In this case, according to the respondents, the provision for arbitration is not in the Will but in a subsequent declaration allegedly made by Durganarayan Sharma, stating that if there is any dispute in regard to his Will dated 28.12.2003, it shall be referred to his friend, U.M. Bhandari, Advocate, as the sole arbitrator whose decision shall be final and binding on the parties. A unilateral declaration by a father that any future disputes among the sons should be settled by an arbitrator named by him, can by no stretch of imagination, be considered as an arbitration agreement among his children, or such of his children who become parties to a dispute. At best, such a declaration can be expression of a fond hope by a father that his children, in the event of a dispute, should get the same settled by arbitration. It is for the children, if and when they become parties to a dispute, to decide whether they would heed to the advice of their father or not. Such a wish expressed in a declaration by a father, even if proved, cannot be construed as an agreement in writing between the parties to the dispute agreeing to refer their disputes to arbitration.

15. We are therefore of the view that there is no arbitration agreement between the parties and the learned Designate committed a serious error in allowing the application under sections 11 and 15(2) of the Act and holding that there is an arbitration agreement between the parties to the dispute and appointing an arbitrator.

16. What has been considered and decided above is only the question whether there is an arbitration agreement or not. We have not examined or recorded any finding as to the existence or validity of the Will dated 21.10.2003 or the declaration dated 15.10.2005 said to have been made by

Mr. Durganarayan Sharma, propounded by the respondents and denied by the appellant.

17. In view of the foregoing, this appeal is allowed and the impugned order of the Designate of the Chief Justice appointing an Arbitrator is set aside.

