

CASE NO.:
Appeal (civil) 10 of 2008

PETITIONER:
Atul Singh & Ors.

RESPONDENT:
Sunil Kumar Singh & Ors.

DATE OF JUDGMENT: 04/01/2008

BENCH:
G.P. Mathur & Aftab Alam

JUDGMENT:
J U D G M E N T

Arising out of Special Leave Petition (Civil) No.24729 of 2005)

G. P. MATHUR, J.

1. Leave granted.

2. This appeal, by special leave, has been preferred against the judgment and order dated 4.8.2005 of Patna High Court, by which the Civil Revision Petition preferred by Sunil Kumar Singh (defendant No.3 in the suit) was allowed and the order passed by the trial Court on 17.3.2005 rejecting his prayer for referring the dispute for arbitration under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the 1996 Act') was set aside.

3. In order to understand the controversy raised, it is necessary to mention the basic facts of the case. The appellants herein filed Title Suit No.296 of 1998 in the Court of Sub-Judge-I, Patna, against Sunil Kumar Singh (defendant no.3) and 5 others for a declaration that the reconstituted partnership deed dated 17.2.1992 (effective from 1.4.1992) is illegal, void and without jurisdiction and was also without any intention or desire of Shri Rajendra Prasad Singh (who died after 17.2.1992) to retire from the partnership. A declaration was also sought that the plaintiffs being heirs of late Shri Rajendra Prasad Singh will be deemed to be continuing as partners to the extent of his share. It was further prayed that a decree for rendition of accounts of the firm from 1.4.1992 upto date may be passed and the defendants may be directed to pay to the plaintiffs their share of the profits of the partnership as well as interest and principal amount of unsecured loan advanced by the firm. A further relief for grant of an ad-interim injunction restraining the respondents from mismanaging and misappropriating the funds of the firm was also sought, besides appointment of a Receiver during the pendency of the suit to manage the firm.

4. The case of the plaintiffs, as set out in plaint, in brief, is as under. A partnership firm in the name and style of M/s Veena Theatres Pvt. Ltd. was formed by a deed of partnership on 25.12.1959 and the business of the firm was to book pictures with film distributors at various places and to get them screened or exhibited in the picture hall owned by M/s Veena Theatres Pvt. Ltd. The capital in the firm was invested by the members of the family of Shri Shatrughan Prasad Singh. Shri Rajendra Prasad Singh also subsequently became a partner of the firm by making investments and a deed of partnership was executed on 20.12.1972. The partnership was reconstituted on 21.5.1976, in which the share of Shri Rajendra

Prasad Singh was 21% and on the death of Brij Mohan Prasad Singh, his widow Smt. Sona Devi was inducted as a partner and a fresh deed was executed on 13.1.1989 in which Shri Rajendra Prasad Singh continued to be a partner having 21% share. Shri Rajendra Prasad Singh died on 5.9.1992 leaving behind plaintiff nos.2, 3, 5 and 7, who are his grandsons, as his heirs. The wife and two sons of Shri Rajendra Prasad Singh had predeceased him. The case of the plaintiffs further is that the defendants fraudulently executed another partnership deed on 17.2.1992, in which Shri Rajendra Prasad Singh was not shown as one of the partners, though he had neither given any consent nor had expressed his desire for retiring from the partnership. The plaintiffs made a request to the defendants to give the accounts of the partnership firm and give them their share of profits, but the defendants refused to do so on the ground that they or their predecessor-in-interest viz. Shri Rajendra Prasad Singh were not partners in the partnership deed which was executed on 17.2.1992. The suit was accordingly filed on 1.8.1998 for the reliefs mentioned above.

5. The suit proceeded ex-parte against all the defendants except Birendra Kumar Singh (defendant no.2), who appeared before the trial Court and moved an application for giving time to file written statement. He also moved an application for rejecting the plaint under Order VII Rule 11 CPC on 18.9.1998, which was rejected on 16.1.2002. A review petition seeking review of the aforesaid order was filed but the same was dismissed on 29.4.2004. He, thereafter, moved an application on 3.8.2004 for referring the dispute for arbitration, but subsequently his counsel conceded that the said application was not maintainable.

6. Sunil Kumar Singh (defendant no.3), who is son of Birendra Kumar Singh (defendant no.2) did not put in appearance despite service of summons and the trial Court vide order dated 28.6.1999 directed to proceed ex-parte against him. After more than 5 years defendant no.3 moved two applications on 14.10.2004 for setting aside the order dated 28.6.1999 by which the Court had directed to proceed ex-parte against him and also sought time to file written statement. On the concession made by the plaintiffs, the order to proceed ex-parte against defendant no.3 was set aside on 3.11.2004. The defendant no.3 thereafter moved an application on 25.11.2004 under Section 34 of the Arbitration Act, 1940 praying that in view of the arbitration clause in the agreement dated 13.1.1989, the proceedings in the suit may be stayed and the matter may be referred to arbitration. The plaintiffs filed an objection to the application on 1.12.2004. On 16.12.2004, defendant no.3 filed a supplementary petition in support of his earlier petition dated 25.11.2004 reiterating the prayer for referring the dispute to arbitration. Subsequently, on 28.2.2005, defendant no.3 moved a petition purporting to be supplementary petition to the petitions dated 25.11.2004 and 16.12.2004, wherein it was averred that as the suit is of the year 1998, to avoid any chances of confusion, his earlier petitions may be treated to have been filed under Section 8 of the Arbitration and Conciliation Act, 1996. This petition was opposed by the plaintiff appellants. The trial Court dismissed the petition by the order dated 17.3.2005 mainly on the ground that as Shri Rajendra Prasad Singh (predecessor-in-interest of the plaintiffs) was not a party to the partnership deed which was executed on 17.2.1992, and as the main relief sought in the suit was that the said partnership deed dated 17.2.1992 was illegal and void, which question could only be decided by the civil Court, the dispute could not be referred to arbitration. The defendant no.3 challenged the aforesaid order by filing a Civil Revision Petition which was allowed by the High Court by the impugned order dated 4.8.2005. The operative portion of the order passed by the High Court only says that the Court below has committed error in passing the impugned order. Accordingly, the impugned order is set aside and

this civil revision is allowed.\024 No specific order making reference to arbitration was passed.

7. Shri Ranjit Kumar, learned senior counsel for the appellants, has submitted that the main relief claimed in the suit is that a declaration be made that the reconstituted partnership deed dated 17.2.1992 was illegal, void and without jurisdiction as there was no intention or desire on the part of Shri Rajendra Prasad Singh to retire from the partnership and that the plaintiffs being heirs of Shri Rajendra Prasad Singh, shall be deemed to be continuing as partners to the extent of his share. The other relief regarding rendering of accounts of all transactions from 1.4.1992 onwards was dependent upon the first relief inasmuch as Shri Rajendra Prasad Singh or the plaintiffs were admittedly not shown as partners of the firm in the deed dated 17.2.1992 and unless the said document was declared as void, they could not claim any rights on the basis of earlier deed dated 13.1.1989. Learned counsel has submitted that Shri Rajendra Prasad Singh or the plaintiffs being not parties to the deed dated 17.2.1992, Section 8 of the 1996 Act can have no application to the facts and circumstances of the case and the High Court committed manifest error of law in setting aside the order of the trial Court and allowing the revision petition filed by defendant no.3. Learned counsel has also submitted that having regard to the facts of the case, the relief of declaration that the partnership deed is illegal or void or the relief of cancellation thereof can only be granted by the Civil Court and not by an arbitrator. In support of his submission Shri Ranjit Kumar has placed reliance on the following observations made in *Khardah Company Ltd. v. Raymon & Company (India) Pvt. Ltd.*, AIR 1962 SC 1810 :

It cannot be disputed that the expression \023arising out of\024 or \023concerning\024 or \023in connection with\024 or \023in consequence of\024 or \023relating to this contract\024 occurring in an arbitration clause in an agreement to purchase goods are of sufficient amplitude to take in a dispute as to the validity of the agreement. But the arbitration clause cannot be enforced when the agreement of which it forms an integral part is held to be illegal. On principle it must be held that when an agreement is invalid every part of it including the clause as to arbitration contained therein must also be invalid. (1942) AC 356 and AIR 1959 SC 1362 and ILR (1948) 2 Cal 171 and AIR 1954 Mad 528(531), Rel. on; AIR 1952 SC 119, Ref. (Para 4).

Accordingly, a dispute that the contract of which the arbitration clause forms an integral part is illegal and void is not one which the arbitrators are competent to decide under the arbitration clause although it is of sufficient amplitude to take in a dispute as to the validity of the agreement and in consequence a party to the contract is entitled to maintain an application under S. 33 for a declaration that the contract is illegal and that in consequence the proceedings taken thereunder before the arbitrators and the award in which they resulted were all void : AIR 1959 SC 1357, Rel. on. (para 13)

Learned counsel has also submitted that the suit was filed on 1.8.1998 and defendant no.2 having failed in his attempt to get the matter referred to arbitration, his son Sunil Kumar Singh (defendant no.3) who was set ex-parte on 28.6.1999 moved the application for staying the suit under Section 34 of Arbitration Act, 1940 on 5.11.2004 and then moved the application giving rise to the order under challenge on 28.2.2005 and such an application having been moved after an inordinate delay, it was wholly improper on the part of the High Court to have accepted his prayer. It has been further urged that there was non-compliance of Sub-section (2) of Section 8 of the

1996 Act as the application moved by defendant no.3 was not accompanied by the original arbitration agreement or a duly certified copy thereof and, therefore, the same ought to have been rejected. Shri S.B. Sanyal, learned senior counsel for the respondent, has submitted that the plaintiffs in fact are claiming rendition of accounts and their share in the partnership business for which they are basing their claim on the partnership deed dated 13.1.1989 to which Shri Rajendra Prasad Singh was a party and the said deed contains an arbitration clause. In such circumstances, the High Court rightly referred the dispute for arbitration and the contention raised by learned counsel for the plaintiffs has no substance.

8. In order to appreciate the contention raised by learned counsel for the parties, it will be convenient to set out Sections 7 and 8 of the 1996 Act :

7. Arbitration agreement. - (1) In this Part, 'arbitration agreement' means 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.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(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.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

8. Power to refer parties to arbitration where there is an arbitration agreement. - (1) A judicial 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 subsection (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.

Sub-section (1) of Section 8 of the 1996 Act says that a judicial 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. Therefore, for application of Section 8, it is absolutely essential that there should be an arbitration agreement between the parties. It is an admitted fact that neither Shri Rajendra Prasad Singh nor the plaintiffs are parties to the partnership

deed dated 17.2.1992. There is no document as defined in Section 7 of 1996 Act which may contain the signature of either Shri Rajendra Prasad Singh or the plaintiffs. Similarly, there is no document as contemplated by clauses (b) or (c) of Sub-section (4) of Section 7 of 1996 Act from which it may be spelled out that either Rajendra Prasad Singh or the plaintiffs were parties to clause relating to arbitration contained in the partnership deed dated 17.2.1992. It is also an admitted fact that Shri Rajendra Prasad Singh was alive when the said partnership deed dated 17.2.1992 was executed. Therefore, on the face of it Section 8 of 1996 Act would not apply to any dispute concerning the said partnership deed dated 17.2.1992 and the matter cannot be referred to arbitration.

9. The first relief claimed by the plaintiffs in the suit is a decree for declaration that the reconstituted partnership deed dated 17.2.1992 was illegal and void and there was no intention or desire of Shri Rajendra Prasad Singh to retire from the partnership and further that the plaintiffs being heirs of Shri Rajendra Prasad Singh will be deemed to be continuing as partners to the extent of his share. It is true that the plaintiffs have also sought rendition of accounts and their share of profits from the partnership as well as interest over the unsecured loan and the principal amount of unsecured loan on rendition of accounts. For getting this relief, the plaintiffs undoubtedly rely upon the partnership deed dated 13.1.1989. However, this deed of 1989 could be relied upon and form the basis of the claim of the plaintiffs only if the partnership deed dated 17.2.1992 was declared as void. If the deed dated 17.2.1992 was not declared as void and remained valid and operative, the plaintiffs could not fall back upon the earlier partnership deed dated 13.1.1989 to claim rendition of accounts and their share of profits. Therefore, in order to get their share of profits from the partnership business, it was absolutely essential for the plaintiff appellants to have the partnership deed dated 17.2.1992 declared as illegal, void and inoperative. The relief for such a declaration could only be granted by the civil Court and not by an arbitrator as they or Shri Rajendra Prasad Singh through whom the plaintiffs derive title, are not party to the said deed. The trial Court had, therefore, rightly held that the matter could not be referred to arbitration and the view to the contrary taken by the High Court is clearly illegal.

10. Sub-section (2) of Section 8 of the 1996 Act says that 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. As already stated in the earlier part of the judgment, defendant no.3 had moved an application on 25.11.2004 under Section 34 of the Arbitration Act, 1940 for staying the proceedings of the title suit and for referring the matter to arbitration. He filed a supplementary petition to the aforesaid application on 16.12.2004. Herein also reference was made to Section 34 of Arbitration Act, 1940. Thereafter, he filed an application on 28.2.2005 praying that as the Arbitration Act, 1940 had been repealed and the suit is of 1998, to avoid any confusion, his earlier petitions may be treated to have been filed under Section 8 of the Arbitration Act, 1996. None of these petitions were accompanied by the original arbitration agreement dated 17.2.1992 or a duly certified copy thereof. In fact, there is no requirement of filing the original arbitration agreement or a duly certified copy thereof under Section 34 of Arbitration Act, 1940 and as such there was no occasion for defendant no.3 to file the aforesaid document. The third petition filed on 28.2.2005 contained the following prayer :

\023It is, therefore, prayed that your honour may graciously be pleased to treat the petitions dated 25.11.04, 16.12.04 and the present petition as supplement and part of each other for deciding the prayer with regard to stay of the proceedings of the aforesaid suit and/or to

refer to arbitration in view of the arbitration agreement covering the subject matter of this suit.\024

There is no whisper in the petition dated 28.2.2005 that the original arbitration agreement or a duly certified copy thereof is being filed along with the application. Therefore, there was a clear non-compliance of sub-section (2) of Section 8 of 1996 Act which is a mandatory provision and the dispute could not have been referred to arbitration. Learned counsel for the respondent has submitted that a copy of the partnership deed was on the record of the case. However, in order to satisfy the requirement of sub-section (2) of Section 8 of the Act, defendant no.3 should have filed the original arbitration agreement or a duly certified copy thereof along with the petition filed by him on 28.2.2005, which he did not do. Therefore, no order for referring the dispute to arbitration could have been passed in the suit.

11. In view of the discussions made above, the appeal is allowed with costs and the impugned order dated 4.8.2005 passed by the High Court in Civil Revision No.1010 of 2005 is set aside.