

% *Date of Judgment: 28.03.2011*

M/S ASHOKA INDUSTRIES (INDIA) Appellant
Through: Mr.Ramesh C.Sharma, applicant
in person.

SHRI RAJINDER PERSHAD SHARMA Respondent.
Through: Respondent in person.

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

1. This is an appeal impugning the judgment and decree dated 19.5.2005 which had endorsed the finding of the trial judge dated 13.12.2003, although for different reasons. The trial judge on 13.12.2003 had allowed the application filed by the applicant under Section 31(2) of the Arbitration Act 1940 (hereinafter referred to as 'the said Act') and had by relying upon the aforementioned provision of law held that the subject matter of the dispute referred to arbitration in terms of the arbitration agreement between the parties is the same as the dispute now emanating from the pleadings in the present suit; in terms of Section 31(2) of the said Act; the court had held that it has no jurisdiction to entertain the said suit. This finding was endorsed by the first appellate court although the provision section 31(2) of the said Act had not been adverted to; the plaint had been rejected under Order 7 Rule 11 (d)

of the Code of Civil Procedure (hereinafter referred to as 'the Code').

2. This is a second appeal; it is yet at the stage of admission. Substantial questions of law have been formulated on page 5 of the body of the appeal; they read as follows:

1. Whether that court has jurisdiction to entertain and allow an application made under Section 31(2) of Indian Arbitration Act, 1940 in which neither any award has been filed nor is likely to be filed?
2. Whether provisions of Section 31(2) of the Indian Arbitration Act, 1940 can be applied to a suit in which the plaintiff is not seeking the court to decide existence, effect, or validity of any Arbitration Agreement or award?
3. Whether a court can dismiss a suit or reject the plaint of a civil suit by applying Section 31(2) of the Indian Arbitration Act, 1940?
4. Whether all civil suits are to be tried only by that court where some award is pending under section 17 of the Indian Arbitration Act, 1940 irrespective of the cause of action?
5. Whether a court may dismiss a suit by looking in such papers which are Zerox copies; which have neither been proved by the defendant nor have been received in evidence by the court?
6. Whether court can dispense with proof of a disputed question of fact and dismiss a suit without seeking the defendant to prove his such material allegations as have been denied by the plaintiff?"

3. This is a dispute between two brothers. On behalf of the appellant, it has been pointed out that the subject matter of the reference before the arbitrator was distinct and separate from the subject matter of the suit; this is clear from the averment made in the plaint. Attention has been drawn to the plaint as also to the prayer clause. It is pointed out that even otherwise the dismissal of the suit under Order 7 Rule 11 of the code was unwarranted for the reason that no such application was on record; the application on record was an application under Section 31(2) of the said Act. The judgment is perverse; it is liable to be set aside.

4. Arguments have been controverted. It is pointed out that

there is no perversity in the said findings.

5. The plaintiff before the trial court was M/s Ashoka Industries (India); it has been described as a registered partnership firm. It was established in 1957. In the plaint, it is stated that the defendant was only three years of age when this partnership business was started. Cause of action had been detailed in para 17. Prayer clause is as follows:

(i) Pass a decree for declaration thereby declaring that Shri Rajinder Pershad Sharma holds no rights, title and interests of any kind what so ever in the goodwill, business, premises of M/s Ashoka Industries (India) at 28/2-A, Gali no.6, New Rohtak Road, New Delhi & at F-25/4, Okhla Industrial area phase-II, New Delhi and in all other assets of the plaintiff w.e.f. 23.6.1987 whereafter the plaintiff is a firm of the remaining four partners in equal shares and acts and deeds of Shri Rajinder Pershad Sharma done on behalf of the plaintiff after 23.6.1987 are null, void, of no effect and not binding on the plaintiff.

ii. pass a decree of perpetual injunction against Shri Rajinder Pershad Sharma from representing M/s Ashoka Industries (India) in any capacity and for any purpose what so ever and further restrain him, his agents, associates, employees or any body claiming authority under Shri Rajinder Pershad Sharma, from entering, using, occupying premises 28/2-A, Gali no.6, New Rohtak Road, New Delhi and F-25/4, Okhla Industrial Area Phase-II, New Delhi and removing, dealing in any manner the machineries and all assets of the plaintiff including car DLJ-9873 and Scooter no.DDO-5965.

iii. Pass a decree for compensation/damages in favour of M/s Ashoka Industries (India) and against the defendant Shri Rajinder Pershad Sharma for such amount as is found to be due to the plaintiff from the defendant for effecting adversely the goodwill, business and assets of M/s Ashok Industries (India).

6. The disputes which were the subject matter of reference to arbitration are contained in the deed of reference which was made to the arbitrator (page 113 of appeal book). Mr.Kanhiya Lal and

Mr.Madan Lal Ahula had been appointed as Joint Arbitrator to resolve:

“our differences regarding distribution of under mentioned Assests left by our father Late Shri Rahu Nath Parshad Sharma, who expired on 22.6.1987.

1.Banglow No.60/15, Ramjas Road, Karol Bagh, New Delhi.

2.Ashoka Industries, 28/2, Rohtak Road, Karol Bagh, New Delhi.

.....”

What was agreed to be referred to arbitration of the two Arbitrators was to resolve their differences regarding distribution of assests of M/s Ashoka Industries as well. It is not in dispute that M/s Ashoka Industries is a partnership firm. This is clearly averred in the plaint filed in the present suit proceedings. It is clear that what has been referred to for arbitration also forms the subject matter of the present suit. In these circumstances, impugned judgment had correctly noted that the present suit is liable to be dismissed as the same subject matter of the disputes has been referred to for arbitration.

7. The finding in the impugned judgment reads as follows:

“Now reverting to the merits of the case, I may observe that it is an unfortunate litigation between the brothers over the distribution of property left by their father. Series of litigation had taken place between them. The suit out of which the present appeal arise was filed in 1993 for declaration that defendant/respondent holds no right, title or interest in the goodwill of business and premises of M/s Ashoka Inds. (India) 28/2A, Gali Mo.6, New Rohtak Road, Delhi and F-25/4, Okhla Industrial Area, Phase II, New Delhi and other assets of the plaintiff W.E. 23.6.1987 where after the plaintiff firm is of remaining four brothers. A declaration that acts and deeds of defendant on behalf of the firm after 23.6.1987 are null, void, of no effect and not binding on the plaintiff has also been sought. Injunction restraining the defendants from representing the plaintiff firm in any capacity, from entering, using and occupying the aforesaid premises, compensation/damages for effecting

adversely goodwill business and assets of the plaintiff are other reliefs claimed in the suit.

6. The defendant contested the said suit by filing a written statement. Later on the defendant No. 1 moved an application u/o 31 (2) Arbitration Act on 28.1.1998 on the ground that though he has filed an application u/o 7 R 11 CPC yet the present suit is not maintainable in view of section 31 Arbitration Act. Admittedly the dispute regarding subject matter of the present suit has already been referred by the parties to arbitrator who has passed an award. That award is awaiting the rule of court, in case No. 786A/88 pending in the Hon'ble High Court. The other similar suit filed by the plaintiff was dismissed by Shri Sudesh Kumar, Civil Judge was which upheld by Shri Ravi Kumar, ADJ in RCA No. 90/96 decided on 24.9.1997. The plaintiff has filed an application U/s 15 Arbitration act in Hon'ble High Court in case No.786A/88 supra. The relief claimed by the plaintiff in the present suit is directly subject matter of the arbitration award pending before the Hon'ble High Court. There is every likelihood of passing contradictory order/judgment with respect to the same subject matter by two different courts.

7. In reply the plaintiff took preliminary objection that cause of action for the present suit arose when plaintiff pleaded to obtain order dated 30.05.1990 in suit No. 1827/90. On merits it denied that plaintiff referred any dispute to the arbitration. It denied that it is claiming any relief pending in case No. 786A/88.

8. After going through the material on record and listening the arguments the Ld. Trial Court was of the view that section 31 (2) Arbitration Act provides that any question regarding validity, effect or existence of award or arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the court in which the award under the agreement has been or may be filed and by no other court.

9. Undisputedly the parties referred disputes to arbitration of Shri Kanhaiya Lal and Madan Lal Ahuja who gave award dated 17.03.1988. That award has gone against the plaintiff. The plaintiff has filed objection against that award which are pending before the Hon'ble High Court. Now the question to be decided is whether in view of those objection, the present suit could proceed.

10. The appellant submitted that first of all the proceeding for making award rule of the court, pending in the Hon'ble High Court are under Arbitration Act, 1940 which has been repealed by Arbitration and Conciliation Act, 1996, application u/s 31 of the Arbitration Act, 1940 could not be filed after the repeal of 1940 Act. I am unable to subscribe the arguments. Section 85 of Arbitration and Conciliation Act, 1996

contains saving clause that provision of the old Act would apply to the cases where proceeding had commenced under the old Act.

11. The other plea taken by the appellant is that if section 31 Arbitration Act, 1940 bars proceeding application itself was misconceived. Again the argument is fallacious. After all the bar had to be brought to the notice of the court by one way or the other way. The proper way was to move application which the defendant did.

12. The counsel for the respondent also raised a preliminary objection that section 39 Arbitration Act 1940 which deals with appeal does not provide for appeal against u/s 31 of the said Act. Hence appeal is not maintainable. The appellant suitably refuted the arguments by stating that his appeal is not under Arbitration Act. Rather the same is u/o 96 CPC against decree whereby his suit was dismissed. I find considerable justification in the plea raised by appellant. Hence the objection raised by the counsel for the respondent is over ruled.

13. The appellant drew my attention towards deed of reference to arbitration which is placed at page 775 of the file of Ld. Trial Court. He submitted that item No.2 of reference of pertain to Ashok Industries and not Ashok Industries (India). He went on to submit that the address of Ashok Industries mentioned in deed of reference is 28/2 and not 28/2A. Similarly the locality mentioned in deed of reference is Rohtak Road. There are two Rohtak Roads in Delhi. One is old Rohtak Road and other is New Rohtak Road. The deed of reference does not mention as to on which Rohtak Road suit property was situated. Gali No. 6 is also mentioned in the deed of reference. Thus he wanted me to hold that reference is pertaining to some different firm other than the plaintiff of the present case.

14. I am at a loss to appropriate the arguments. The arguments are quite farfetched. The discrepancies in the name and address of firm are minor. It is not the case of the parties that there were two different firms, one under the name and style of M/s Ashok Industries and other under the name and style of M/s Ashok Industries (India). Similarly it is not the case of the parties that they had the firm at different places, one at 28/2 and other at 28/2A. The parties were lay man and they incorporated broad particulars in the deed of reference. Omissions and discrepancies have not caused any prejudice to the appellant.

15. The appellant submitted that in the suit filed by the defendant and registered as 1827/90 in Hon'ble High Court, defendant mentioned in para 17 that the Hon'ble High Court under Arbitration Act had limited jurisdiction and could not decide validity of the partnership deed dated 27.12.1987. Thus it had become necessary for him to file the present suit. In view of the same now the defendant cannot be allowed to contend

that the proceedings under Arbitration Act pending in Hon'ble High Court are wide enough to include the present suit. The argument is misleading. It is not the version of the parties which is material. Rather it is the law which matters.

16. Several similar litigation between the parties had already been rejected due to section 31 Arbitration Act, 1940. One of them is suit No. 149/98 titled as Ashok Kumar Sharma Versus Rajinder Parshad Sharma dismissed by Ms Sukhvinder Kaur, Civil Judge vide judgment dated 2.3.2001, other is order dated 14.3.2000 passed by Ms Nisha Saxena, Civil Judge, Delhi, third is order dated 15.7.2000 passed by Shri Sahabuddin, Civil Judge, Delhi in suit No. 254/98, 4th is order dated 31.8.1996 passed by Shri Sudesh Kumar, Civil Judge, in suit No.275/95 which was upheld by Shri Ravi Kumar,ADJ vide order dated 24.9.1997 in RCA No. 19/96. The 5th is judgment dated 19.5.2004 passed by Shri Pulatsya Paramachala, Civil Judge, Delhi in suit No. 945/96 (Old No. 1827/90 supra) filed by defendant. The said judgment has not been challenged and has become final. During arguments I was informed that in one matter Shri V.K. Jain, ADJ adjourned the matter sine die with a view to avoid conflicting judgments. That is the theme behind section 31 Arbitration Act, 1940.

17. The appellant relied upon Lachhuman Singh Versus Makar Singh AIR 1954 Patna 27 to make out that section 31 merely states that which court shall decide question regarding validity, effect or existence of an award; in terms it does not bar a suit. If the argument of the appellant is accepted, it is not clear as to what is the effect of section 31, if the same does not bar suit. To permit suit to continue would amount to nullifying section 31 which is not permissible. Practically effect of section 31 to bar a suit. Section 32 Arbitration Act which bars suit is supplementary to section 31 and two sections read together would bar suit. The appellant also relied upon Orient Transport Company Versus M/s Jaya Bharat Credit and investment company Ltd. AIR 1987 SC 2289. In that case it has been held that section 32 of the Arbitration Act does not contemplate case of suit to challenge validity of contract merely because it contain an arbitration clause. The same has no application to the facts of the present case.

18. The counsel for the respondent relied upon M/s Delux Silk Traders Versus M/s Satyanarain Mahender Kumar and others AIR 1979 Bombay 149 in which it was held that though no decree is passed in terms of award and though the award is unenforcible. It bars suit between the parties on same cause of action. That advances the case of the respondent.

19. The appellant also raised a contention that in the written statement, the defendant did not raise any objection about the maintainability of the suit. So the said objection stands waived. The defendant could not be allowed to take up a new plea regarding maintainability of the suit, by way of application U/s 31 Arbitration Act. I do not agree. Bar of suit is a legal plea which goes to the root of the case. The same can be taken at any stage without there being a mention thereof in written statement.

20. For the foregoing reasons I do not find any merit in appeal. Anyhow the Ld. Trial Court ought to have rejected the plaint u/o 7 R 11 (d) CPC as it was barred by law, instead of dismissing the suit. The reason being that the suit was not being decided on merits and so it should not carry label of being dismissed which may give rise to the conclusion that the plea has already been adjudicated or that the judgment would bar adjudication of those pleas in different proceedings on the doctrine of resjudicata.

21. To sum up the appeal is accepted, judgment and decree of the Ld. Trial are modified to the effect that plaint shall be deemed to be rejected instead of being dismissed. Parties are left to bear their own cost. Decree sheet be prepared accordingly. File be consigned to Record Room."

8. There was no cause of action ad deciphered in the plaint. Plaint had rightly been rejected under Order 7 Rule 11 of the Code. In a judgment reported in 1999 AIHC 470, 473 (Mad) Nesammal & Anr. Vs. Edward & Anr. the Supreme Court had held that the provisions of Order 7 Rule 11 of the Code are not exhaustive; plaint is liable to be rejected if it does not disclose cause of action and the court has got inherent powers to see that vexatious litigations are not allowed to take or consume the time of the court.

9. It is also not in dispute that the reference of the disputes before the Arbitrator has since been decided; the Award has been pronounced and the Award has also been made into a Rule of the Court. This is vide judgment dated 08.12.2008 in CS(OS) No.786A/1988 Rajinder Parshad Sharma Vs. Ashok Sharma & Ors. The said judgment has since attained a finality.

10. No substantial question of law has arisen. The impugned judgment can in no manner be said to be perverse. The impugned judgment had correctly noted that the subject matter of the present suit was referred to for arbitration. The Arbitrators have since decided the disputes; Award has been made into a Rule of Court; that judgment has since attained a finality.

11. Appeal as also pending application is dismissed in limine.

INDERMEET KAUR, J.

MARCH 28, 2011

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