

(1993) 06 BOM CK 0032

In the Bombay High Court

Case No : Appeal No. 296 of 1989 in Arbitration Petition No. 1455 of 1981

Chandulal Hathibhai Shah

APPELLANT

Vs

Champaklal Ambalal Parikh

RESPONDENT

Date of Decision : 25-06-1993

Acts Referred:

Arbitration Act, 1940 — Section 20, 8
Partnership Act, 1932 — Section 69

Citation : AIR 1994 Bom 16 : (1994) 2 BomCR 174 : (1994) 96 BOMLR 432 : (1993) 2 MhLj 1267

Hon'ble Judges : Sujata V. Manohar, J;N.D. Vyas, J

Bench : Division Bench

Advocate : P.K. Samdani, instructed by G.S. Manaswala, for the Appellant; D.C. Shah, for the Respondent

Judgement

Sujata Manohar, J.—The appellant and the respondent entered into a Deed of Partnership dated 1.1.1979 under which they agreed to carry on business in yarn and as commission agents in partnership in the firm name and style of M/s. C. H. Shah & Co. The partnership, however, is not registered. A recital in the Partnership Deed states that the respondent was tenant of business premises situate at Room No. 29, 152/2 Narayan Dhuru Street, Bombay-400003. Clause 5 of the Partnership Deed provides that the partnership business as to be conducted in the said premises. Clause 29 of the partnership deed provides that any dispute or question which may arise in connection with the business of the said partnership or any matter connected with it shall, unless decided by mutual agreement by the parties, be referred to arbitration of arbitrators, one to be appointed by each party to the dispute.

2. Since about July, 1981 there were disputes between the parties. According to the respondent, from 20th July, 1981 onwards the appellant prevented the respondent from entering the said premises. The respondent thereupon gave a notice of dissolution on 1.1.1981. The respondent thereafter filed in this court Arbitration Petition No. 1455 of 1981 u/s 20 of the Arbitration Act praying : (a)

that the arbitration agreement contained in the Deed of Partnership dated 1st January, 1979 be ordered to be filed in this court and (b) that this court be pleased to make an order of reference to the arbitrator to be appointed by the parties failing which to the arbitrator to be appointed by this court and costs of the petition. This petition has been allowed by a learned single Judge of this court by his judgment and order dated 2nd February, 1988. The appellant has filed the present appeal from the above judgment.

3. As the partnership deed of 1.1.1979 is not registered, it is contended by the appellant that in view of Section 69 of the Partnership Act, 1932 a suit petition of the respondent u/s 20 of the Arbitration Act is barred. Section 69 of the Partnership Act deals with the effect on non-registration of a partnership.

"69. Effect of non-registration. - (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2)

(3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceedings to enforce a right arising from a contract, but shall not affect :

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm, or"

Under Section 69(1), therefore, no suit can be filed by one partner of a firm against another partner to enforce a right arising from a contract unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm. The same bar is extended by Section 69(3) to other proceedings to enforce a right arising from a contract. Therefore even if we do not consider a petition u/s 20 of the Arbitration Act as a suit, a petition u/s 20 of the Arbitration Act would be covered by Section 69(1) read with Section 69(3). This is, provided it is considered as a proceeding to enforce a right arising from a contract.

4. The question is whether a petition u/s 20 of the Arbitration Act is a proceeding to enforce a right arising from a contract as between the two partners of an admittedly unregistered firm. The arbitration clause is a part of the contract between the partners embodied in the partnership deed. A petition u/s 20 of the Arbitration Act which is taken out by the respondent is clearly to enforce this arbitration clause in the Partnership Deed. The only prayers in the proceedings are for a declaration that the arbitration agreement contained in clause 29 be filed and a reference be made to arbitration accordingly. Therefore, these

proceedings will have to be considered as proceedings to enforce a right arising from a contract which is sought to be enforced by one partner against another. Since the partnership is unregistered, such a petition cannot be filed.

5. It was submitted by learned Advocate for the respondent that u/s 69(3) of the partnership Act certain proceeding excluded from the bar. One such proceeding referred to in Section 69(3)(a) is a proceeding for the enforcement of any right to sue for the dissolution of a firm or for accounts of the dissolved firm or any right or power to realise the property of a dissolved firm. The respondents submit that the purpose of referring the dispute to arbitration is to secure dissolution of the partnership firm and to obtain accounts. Therefore, a suit u/s 20 of the Arbitration Act should be considered as a suit for the enforcement of a right to dissolve the firm and/or for its accounts. This submission has no merit. A Section 20 suit cannot be considered as a proceeding for the dissolution of partnership or for accounts. It is a proceeding u/s 20 of the Arbitration Act to have the arbitration agreement filed in court. Section 20 of the Arbitration Act provides that where any persons have entered into an arbitration agreement and where a difference arises in that connection, the parties may apply to the court having jurisdiction in the matter to which the agreement relates, that the agreement be field in court. It may be that once a suit u/s 20 is decreed, the disputes which are referred to arbitration would be for dissolution of the firm and for accounts. But that does not make a proceeding u/s 20 of the Arbitration Act a proceeding for the enforcement of the right to dissolve the partnership or for accounts.

6. It was also submitted be learned Advocate for the respondent that Section 69(3)(a), apart from excluding a proceeding for dissolution of a firm and for accounts, also excludes a proceeding to enforce any right in respect of the firm. This submission has to be stated to be rejected. The language of Section 69(3) (a) is very clear. The term "any right or power to realise the property of a dissolved firm" clearly refers to a proceeding to realise the property of a dissolved firm only. The words "right to power" go together. Both the right or power are with reference to realising the property of the dissolved firm. The words "any right" cannot be read in isolation as submitted by the respondent to cover any proceeding to enforce any right of one partner against another. Therefore, the petition u/s 20 of the Arbitration Act is clearly barred by the provisions of Section 69 of the Indian Partnership Act, 1932.

7. The respondent relied upon a decision of this court in the case of Appaya v. Subrao (1937) 39 BLR 1214 : AIR 1938 Bom 108. This was a suit to recover a debt due to a dissolved partnership firm brought by persons who were partners of the firm at the date of dissolution. The suit was considered as falling within the held maintainable even though the firm was unregistered. This decision is of no assistance in the present case. This is not a suit to recover the debts of a dissolved firm. Hence the ratio of this judgment has no application.

8. We derive support from a decision of the Supreme court in the case of Jagdish

Chander Gupta Vs. Kajaria Traders (India) Ltd., . In the case before the Supreme Court also the partnership deed contained a clause which provided for reference of disputes to arbitration. The partnership was unregistered. When disputes arose between the partners, one of the parties asked the other party to concur in the appointment of a sole arbitrator or to appoint his own arbitrator. The other partner disputed this. Hence the first party filed an application u/s 8(2) of the Indian Arbitration Act for the appointment of an arbitrator. The Supreme Court held that an application u/s 8(2) of the Indian Arbitration Act was barred by the provisions of Section 69(3) of the Partnership Act. The Supreme Court in Para 5 of the said judgment has considered whether a proceeding u/s 8(2) of the Arbitration Act can be considered as one to enforce a right arising from a contract between the parties. It has said, "The proceeding under the eighth section of the Arbitration Act has its genesis in the arbitration clause, because without an agreement to refer the matter to arbitration that section cannot possibly be invoked. Since the arbitration clause is a part of the agreement constituting the partnership it is obvious that the proceeding which arises is from a contract ... The words of Section 69(3), "a right arising from a contract" are in either sense sufficient to cover the present matter".

9. The next question that the Supreme Court considered in that case was, whether the words "other proceeding" in Section 69(3) have to be considered ejusdem generis with the words "a claim for set off" or whether they are wide enough to cover proceedings under the arbitration Act also. The Supreme Court held that the words "other proceeding" should be widely interpreted and should not be restricted to proceedings in a suit or a claim of set off. The Supreme Court held that these words must receive their full meaning untrammelled by the words "a claim of set-off". It held that a proceeding u/s 8(2) of the Arbitration Act was covered by Section 69(3).

10. The ratio of this judgment applies to the present case. In fact a proceeding u/s 20 of the Arbitration Act is directly to enforce a clause in the partnership contract which provides for reference to arbitration. In the case before the Supreme Court the consequential proceeding u/s 8(2) of the Arbitration Act was also considered as a proceeding to enforce a right arising under that clause. A proceeding u/s 20 of the Arbitration Act is a fortiori a proceeding to enforce a right arising out of the contract of partnership.

11. In the case of Iqbal Singh and Others Vs. Ram Narain and Others, , the Allahabad High Court was concerned with a proceeding u/s 20 of the Arbitration Act to enforce an arbitration clause in a Partnership Deep when the partnership was unregistered. The Allahabad High Court also relied upon the above judgment of the Supreme Court and held that a proceeding u/s 20 of the Arbitration Act is a proceeding between the partners to enforce a right under a contract. It said that since an application u/s 20 of the Arbitration Act was filed by the Appellants in view of the arbitration clause existing in the agreement executed between the parties, it was manifest that proceedings arising out of an application u/s 20

were proceedings to enforce a right arising from a contract as envisaged in sub-section (3) of Section 69. Such a proceeding could not be maintained in view of Section 69(3) of the Partnership Act. The Allahabad High Court has also referred to an earlier judgment of the Lucknow Bench of the same Court in FAFO No. 19 of 1961 decided on 15-4-1966 by Beg & Sehgal JJ. where also the Lucknow Bench of the Allahabad High Court had held that an unregistered firm cannot, u/s 20 of the Arbitration Act, move the court to enforce an arbitration clause in the partnership deed.

12. Therefore, in the present case, the respondent was not entitled to maintain the arbitration petition u/s 20 of the Arbitration Act. By filing such a petition, the respondent cannot be considered as seeking dissolution of the firm and accounts of the dissolved firm.

13. In this view of the matter, we need not examine the second contention which has been raised on behalf of the appellant to the effect that the entire partnership deed is a sham and bogus document and it was never intended to be acted upon. Hence the clause in such a partnership deed dealing with arbitration should not be enforced. According to the appellant this document was executed so that the appellant may obtain the use and occupation of the premises of which the respondent was the tenant. The document was executed in this form in order to get over the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. The learned single Judge also negated this contention. This contention raises several disputed questions of fact which cannot be decided in the present proceedings. We do not see why we should go into this contention when, in any event, the arbitration proceeding is barred by virtue of Section 69 of the Partnership Act.

14. In the premises, the judgment of the learned single Judge is set aside. Appeal is allowed with costs and the petition is dismissed.

15. By an interim order dated 21-9-1981 in the Arbitration Petition, Court Receiver has been appointed, interim receiver of the said property. He has been directed to allow the present appellant to occupy the premises as an agent of the Court Receiver on such terms and conditions as he may deem fit. Accordingly the appellant has remained in possession of the said premises as an agent of the Court Receiver on his paying a sum of Rs. 1,200/- per month. The Court Receiver to continue for a period of 6 weeks from today. On the expiry of the said period, the court receiver of stand discharge on payment of his costs, charges and expenses but without passing of accounts. The amount deposited by the appellant with the Court Receiver to be refunded to the appellant with accrued interest, if any at the time of discharge.

Court Receiver to act on the minutes.

Certified copy expedited.

16. Order accordingly.