(2015) 06 BOM CK 0137

In the Bombay High Court

Case No : Arbitration Petition No. 298 of 2015

Dhiren Lalit Shah and Others APPELLANT

Vs

Sandeep and Company and Others RESPONDENT

Date of Decision : 18-06-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16, 37

Citation : (2015) 06 BOM CK 0137

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Kirit Munshi, Ishi Jain and Neeta Solanki i/by M/s. Kiran Jain and Co., for the Appellant; Birendra Saraf and Pooja Kshirsagar instructed by M/s. Prakash and Co., Advocates for the Respondent

Judgement

R.D. Dhanuka, J.—By this petition filed under Section 37 of the Arbitration and Conciliation Act, 1996, the petitioners have impugned the order passed by the learned arbitrator on 2nd January 2015 thereby accepting the plea of jurisdiction raised by the respondent nos.1 to 6 under Section 16 of the Arbitration and Conciliation Act, 1996 in so far as prayer clauses (c) and (d) of the Statement of Claim is concerned.

2. By the said order, the learned arbitrator has held that the arbitral tribunal does not have jurisdiction to try the claim and grant reliefs in terms of prayer clauses (c) and (d). In so far as prayer clauses (a) and (b) are concerned, it is held by the learned arbitrator that the arbitral tribunal has jurisdiction to try those claims and grant relief. Prayer clauses (c) and (d) of the Statement of Claim are extracted as under :-

"(c) By a suitable order and direction the assets and properties of the respondent no.1 firm may kindly be ordered and directed to be partitioned and 21% of the assets and properties may kindly be apportioned to the share of the claimants;

(d) In the event this Hon''ble Tribunal finds that the partition of the assets and properties of the respondent no.1 firm is not possible, then an order and direction should be made for sale of the assets and properties of the respondent no.1 firm and for payment of 21% share of the value thereof be realised and paid to the claimants."

3. Some of the relevant facts for the purpose of deciding this petition are as under:-

The father of the petitioners, who was one of the partners of the respondent no.1 firm and was having 21% share in the properties and assets of the respondent no.1 firm, expired on 15th August 1994. The mother of the petitioners had filed a suit being Suit No.3092 of 2008 in this Court inter alia praying for administration of estate of her deceased husband Mr. Lalit Jeshinglal Shah including his share in the partnership firm. Mother of the petitioners expired on 12th February 2013 leaving behind the petitioners as her heirs and legal representatives together with estate and the properties. The petitioners took out a Chamber Summons No.313 of 2013 for their transposition as the plaintiffs in the said suit. Learned Single Judge of this Court rejected the said chamber summons filed by the petitioners by an order dated 25th July 2013.

4. The petitioners filed an Appeal No.458 of 2013 before the Division Bench of this Court thereby impugning the order dated 25th July 2013. On 27th November 2013, the petitioners and the respondents entered into consent terms in the said Appeal No.458 of 2013. Under the said consent terms, the parties agreed for an appointment of the sole arbitrator. Clauses 4, 5 and 6 of the consent terms which are relevant for the purpose of deciding this petition are extracted as under :-

"4.The claim of the Appellants/Plaintiffs against defendant nos.1 to 8 as the heirs and legal representatives of late Mr.Lalit Jeshinglal Shah in respect of the share of deceased late Mr.Lalit Jeshinglal Shah in the defendant no.1 partnership firm is referred to the sole arbitrator Mr.Shailesh Shah under clause 17 of the Deed of Partnership dated 11th September 1978.

5. It is clarified that in the Arbitral Proceedings subject to what is stated in Cl.6 herein, the Appellants shall not claim :

(i) to be made partners in the partnership firm i.e. Sandeep and Company.

(ii) a share in the property of the partnership firm, namely, the land with six buildings viz. (1) Sanjay Mansion, (2) Sujal Mansion, (3) Yatin Mansion, (4) Dharmesh Mansion, (5) Hiral and Nirav Mansion and (6) Sandeep Mansion standing thereon and popularly known as "''Bhangwadi"'' situated on the plot of land bearing Cadastral Survey No.1/938 of Bhuleshwar Division admeasuring 3512 sq.mtrs. or thereabouts lying and being and situate at Kalbadevi, Mumbai 400 002.

6. However, the Appellants will be allowed to contend that the valuation of the share of their deceased father Mr.Lalit Shah in the said partnership firm ought to be made on the basis that the Appellants are entitled to be made partners of the

aforesaid firm and that they are entitled to a share in the said property and assets of the firm. The defendant nos.1 to 8 are disputing this contention."

Pursuant to the liberty granted by the learned arbitrator, the petitioners filed a Statement of Claim inter alia praying for various reliefs.

5. The respondent nos.1 to 6 filed an application under Section 16 of the Arbitration and Conciliation Act, 1996 before the learned arbitrator raising an issue of jurisdiction. The learned arbitrator has allowed the said application in so far as prayer clauses (c) and (d) are concerned. Mr. Munshi, learned counsel appearing for the petitioners invited my attention to various clauses of the Partnership Deed including clause 17 thereof. He submits that the arbitration agreement recorded in clause 17 is very wide and all the disputes including prayer clauses (c) and (d) prayed by the petitioners were within the scope of jurisdiction of the learned arbitrator under the said clause of the Partnership Deed. He submits that even in the consent terms and more particularly paragraph 4 thereof, when the learned arbitrator has been appointed by the Division Bench of this Court, the appointment is made under clause 17 of the Partnership Deed dated 11th September 1978. He submits that the learned arbitrator had jurisdiction to try the entire dispute as raised by the petitioner under clause 17 of the Partnership Deed dated 11th September 1978.

6. Learned counsel for the petitioners then submits that in so far as clauses 5 and 6 of the consent terms are concerned, the said clauses are not required to be considered while deciding the issue of the jurisdiction under Sections 16 of the Arbitration and Conciliation Act, 1996. He submits that at the most, those clauses could be considered at the stage of considering the claims made by the petitioners on merits. He submits that the intention of the parties was very clear that all the disputes contemplated under clause 17 of the Partnership Deed were within the jurisdiction of the learned arbitrator and were to be adjudicated upon. He submits that in any event, all such issues in terms of prayer clauses (c) and (d) of the Statement of Claim could be considered by the learned arbitrator only after the evidence was led by both the parties and not at the stage of deciding the application under Section 16. In support of this submission, the learned counsel for the petitioners placed reliance on the judgment of the Supreme Court in the case of Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others, AIR 2011 SC 2507 : (2011) 2 ARBLR 155 : (2011) 5 JT 198 : (2011) 5 SCALE 147 : (2011) 5 SCC 532 : (2011) 2 UJ 1472 : (2011) AIRSCW 3089 and in particular paragraph 34 thereof which reads thus :-

"34.The term "'arbitrability"''has different meanings in different contexts. The three facets of arbitrability, relating to the jurisdiction of the Arbitral Tribunal, are as under :-

(i) Whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the Arbitral Tribunal) or whether they would exclusively fall within the domain of public fora (courts).

(ii) Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the "''excepted matters"'' excluded from the purview of the arbitration agreement.

(iii) Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of submission to the Arbitral Tribunal, or whether they do not arise out of the statement of claim and the counterclaim filed before the Arbitral Tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be "''arbitrable"'' if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the Arbitral Tribunal."

7. Learned counsel also placed reliance on the judgment of the Supreme Court in the case of State of Goa Vs. Praveen Enterprises, AIR 2011 SC 3814 : (2011) 3 ARBLR 209 : (2011) 112 CLT 659 : (2011) 8 JT 359 : (2011) 7 SCALE 131 : (2012) 12 SCC 581 : (2011) 10 SCR 1026 : (2012) AIRSCW 3879 and in particular paragraph 11 thereof. It is submitted by the learned counsel for the petitioners based on the aforesaid two judgments that the claims made in terms of prayer clauses (c) and (d), whether they would fall under the category of ''excepted matters'' or whether arbitrable or not, could not have been decided under Section 16 of the Arbitration and Conciliation Act, 1996.

8. In the alternative, learned counsel submits that the petitioners, who have inherited the share of their father who was the partner of 21% share in the Partnership Deed, were entitled to equal share of 21% in all the properties and assets of the respondent no.1 partnership firm and thus such rights which are contemplated under the provisions of the Partnership Deed could not have been taken away under the consent terms. He submits that such part of the consent terms and more particularly recorded in clauses 5 and 6 are thus not enforceable. In support of this submission, learned counsel placed reliance on the judgment of the Supreme Court in the case of Malabar Fisheries Co. Vs. Commissioner of Income Tax, Kerala, AIR 1980 SC 176 : (1979) 12 CTR 415 : (1979) 120 ITR 49 : (1979) 4 SCC 766 : (1980) 1 SCR 696 and in particular paragraph 18 thereof. Reliance is also placed on the judgment of the Supreme Court in the case of Addanki Narayanappa and Another Vs. Bhaskara Krishtappa and Others, AIR 1966 SC 1300 : (1966) 3 SCR 400 and in particular paragraph 6 thereof.

9. Dr. Saraf, learned counsel for the respondent nos.1 to 6 also placed reliance on the judgments of the Supreme Court in the cases of Booz Allen and Hamilton Inc. (supra) and State of Goa Vs. Praveen Enterprises (supra). It is submitted by the learned counsel that issue whether the claims were beyond the scope of reference or not also falls within the ambit of Section 16 of the Arbitration and

Conciliation Act, 1996 and is a jurisdictional issue which has to be decided by the learned arbitrator under Section 16 and could not have been postponed till hearing of the entire matter. He submits that the petitioners who are claiming through their father have by an agreement agreed to a particular share in the properties of the partnership firm.

10. Reliance is placed on clauses 5 and 6 of the consent terms and it is submitted that under clause 5, the petitioners have agreed not to become partners in the partnership firm and also not to claim share in the properties of the firm described in clause 5(ii) of the consent terms. He submits that in so far as clause 6 of the consent terms is concerned, the petitioners were allowed to contend that the valuation of the share of their deceased father in the partnership firm ought to be made on the basis that the petitioners were entitled to be made partners of the said partnership firm and that they were entitled to a share in the properties and assets of the said firm. He submits that under clauses 5 and 6 read with clause 4 of the consent terms, the petitioners have substituted their entitlement under the Partnership Deed by entering into the consent terms. This Court has passed a decree in terms of the consent terms. Mr.Shah, learned counsel appearing for the respondent nos.7 and 8 adopts the submission made by the learned counsel for the respondent nos.1 to 6.

11. A perusal of the record clearly indicates that the petitioners, who were heirs and legal representative of late Mr. Lalit Jeshinglal Shah who was one of the partners of the respondent no.1 firm, were the appellants in the said proceedings. The petitioners were the signatories to the consent terms arrived at between the parties. Clause 4 of the consent terms clearly provided that the claim of the petitioners herein in respect of the share of late Mr. Lalit Jeshinglal Shah in the respondent no.1 partnership firm was referred to the sole arbitrator under clause 17 of the Partnership Deed. In clause 5, it was clarified that in the arbitral proceedings, the petitioners shall not make any claim for making them as partners in the partnership firm and also not to claim a share in the properties of the partnership firm mentioned in clause 5 (ii). In clause 6, the petitioners have been permitted to contend before the learned arbitrator about the mode of valuation while computing the share of deceased Mr. Lalit J.Shah which would devolve in the petition.

12. It is thus clear that the rights and entitlement of the legal representatives of the deceased partner under the said Partnership Deed dated 11th September 1978 are substituted by an agreement arrived at between the parties by entering into the consent terms. This Court has already accepted such agreement by way of consent terms on record and had decreed the said suit. I am thus not inclined to accept the submission of the learned counsel for the petitioners that the parties could still make claim in terms of prayer clauses (c) and (d) under the Partnership Deed dated 11th September 1978.

13. In my view, the rights and obligations of the petitioners under the Partnership Deeds are substituted by the provisions of the consent terms which

are binding on the parties. In my view, the partners of the partnership firm or legal heirs of the deceased partner can arrive at an agreement about their respective entitlement in the partnership firm during the existence of the partnership firm or when any partner expires or retires. Such agreement entered into in terms of clauses 4, 5 and 6 of the consent terms, in my view, is in consonance with the provisions of the Partnership Act.

14. In so far as the submission of the learned counsel for the petitioners that the issue whether prayer clauses (c)and (d) were arbitrable or not could be decided only after recording the evidence between the parties and were not contemplated under Section 16 of the Arbitration and Conciliation Act, 1996 is concerned, in my view, there is no merit in this submission of the learned counsel. Petitioners have under clauses 5 and 6 of the consent terms agreed that they would not make claim of becoming partners of the respondent no.1 firm and also would not claim any share in the properties of the partnership firm described in clause 5 (ii) of the consent terms. A perusal of the prayer clauses (c) and (d) prayed by the petitioners clearly indicates that both these prayers have been made in the teeth of the said consent terms and more particularly clauses 5 and 6 thereof. Since the petitioners, in my view, have agreed that they would not make certain claims described in clause 5 subject to what was stated in clause 6 therein, all three clauses have to be read together. In my view, if the petitioners could not have made any claim and such claim could not have been decided by the learned arbitrator in view of clauses 4, 5 and 6, the issue raised by the learned counsel for the respondent nos.1 to 6 before the learned arbitrator of jurisdiction could be decided only under Section 16 of the Arbitration and Conciliation Act, 1996.

15. In my view, whether a particular claim made by the parties is within the scope of arbitration agreement or not is an issue of jurisdiction which squarely falls under Section 16 of the Arbitration and Conciliation Act, 1996. Such issue touches the jurisdiction of the learned arbitrator. Learned arbitrator derives his jurisdiction from the agreement between the parties. Learned arbitrator has to decide in accordance with the agreement and not dehors it.

16. Supreme Court in the case of Booz Allen and Hamilton Inc.(supra) has dealt with this issue at length. It is held by the Supreme Court that whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the "''excepted matters"'' excluded from the purview of the arbitration agreement fall under the term of "''arbitrability."'' It is further held that a dispute even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement will not be arbitrable if it is not enumerated in the joint list of disputes referred to arbitration. Similarly, in the case of State of Goa (supra), the Supreme Court has held that where all disputes are referred to the arbitral tribunal, the arbitrator has the jurisdiction to decide all disputes raised in the pleadings subject to any limitations placed by the arbitration agreement. In my view, law laid down in the judgments of the Supreme Court in the cases of Booz Allen and Hamilton Inc.

(supra) and State of Goa Vs. Praveen Enterprises (supra) squarely applies to the facts of this case. The parties, in my view, have limited the scope of arbitration by limiting the rights of parties not to make a particular claim and thereby restricting the jurisdiction of the learned arbitrator not to entertain such claim. Arbitration agreement recorded in clause 4 has to be read with limitations agreed in clauses 5 and 6 of the consent terms.

17. The learned arbitrator, in my view, has rightly allowed the application filed by the respondent nos.1 to 6 under Section 16 of the Arbitration and Conciliation Act, 1996 having found those claims beyond the scope of reference in view of the agreement arrived at between the parties.

18. In so far as the submission of the learned counsel for the petitioners that agreement recorded in clauses 5 and 6 is contrary to the provisions of the Partnership Act, 1932 is concerned, in my view, such argument cannot be allowed to be raised for the first time across the bar in these proceedings. No such issue was raised before the learned arbitrator. Be that as it may, the petitioners have not applied for setting aside the consent terms already entered into between the parties which was an agreement between the parties and the decree passed by this Court.

19. In my view, there is thus no merit in any of the submission of the learned counsel for the petitioners. Petition is devoid of merits and is accordingly dismissed.

20. The petitioners are directed to pay costs of Rs.25,000/-in two sets, one payable to the respondent nos.1 to 6 and the other to the respondent nos.7 and 8 within two weeks from today.