(2010) 11 BOM CK 0117

In the Bombay High Court

Case No : Arbitration Appliation No. 4 of 2007

Ezra Victor Aboody APPELLANT

Vs

H. Dhanrajgir Estate Pvt. Ltd. RESPONDENT

Date of Decision : 19-11-2010

Acts Referred:
Arbitration Act, 1940 — Section 34, 8(2)
Arbitration and Conciliation Act, 1996 — Section 11, 11(6)
Partnership Act, 1932 — Section 69(1), 69(2)(A), 69(3)

Citation : (2010) 11 BOM CK 0117

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : Hiroo Advani and Dinesh Pednekar and Deepak Lad instructed by Advani and Co, for the Appellant; Iqbal Chagla and Lynn Perreira, Farhan Dubash, C. Rashmikant and Pooja Kothari, instructed by y, Federal and K. Rashmikant, for the Respondent

Judgement

D.Y. Chandrachud, J.—This proceeding has arisen in an application u/s 11(6) of the Arbitration and Conciliation Act, 1996.

2. A deed of partnership was entered into between the applicant and the Respondent on 14 February, 2003. The partnership was to commence on the date of the execution of the deed and was to be carried out initially for a term of 3 years. The business of the partnership was to consist of coaching services for centralized admission tests, ancillary software development and other incidental business. The applicant and the Respondent would have an equal share in the profit and loss of the partnership firm. The firm was not registered. The applicant has averred that as a result of a continuing repudiation and material breach committed by the Respondent, the applicant was compelled to end the partnership agreement and to institute a legal action for damages and for the recovery of amounts invested towards initiation of the business. By a notice dated 13 November, 2003 the applicant invoked arbitration and claimed damages of Rs. 4.77 crores on account of loss of profit, loss on account of expenses

incurred on up gradation of the premises, on account of investment in equipment and on intellectual property and other related outgoings.

3. There was a reference to arbitration and the Arbitral Tribunal consisted of three arbitrators. The claim in the arbitration was for an amount of Rs. 14.62 crores. An objection was raised by the Respondent to the effect that the claim in the arbitration was beyond that contained in the notice of invocation, and it lay beyond the jurisdiction of the Arbitral Tribunal to consider the enhanced claim. The plea of the Respondent was accepted by the Tribunal. On 11 September 2006 the applicant applied to the Arbitral Tribunal to withdraw the Arbitration reference and sought leave to file a fresh arbitration reference with an enhanced claim. The Tribunal observed that since the provisions of order XXIII of the CPC were not applicable to arbitral proceedings, no leave was necessary but, if those provisions were applicable to the arbitration reference leave would have been granted as sought. The reference was disposed of as withdrawn. Thereupon followed a fresh invocation of arbitration on 12 September 2006.

4. By a reply dated 4 October, 2006, the Advocate for the Respondent stated that the erstwhile partnership had not been registered. In view of the circumstance that the firm had not been registered, the defence that was sought to be raised was that the applicant shall not be entitled in law to make a reference to arbitration. This proceeding u/s 11(6) of the Arbitration and Conciliation Act, 1996 has been instituted on the failure of the Respondent to concur in the constitution of the arbitral tribunal. A reply has been filed on behalf of the Respondent. The principal defence is that since the partnership was not registered the present application u/s 11 is not maintainable because it is a proceeding to enforce a purported right arising from a contract filed by the applicant as a partner in an unregistered firm. The applicant pleads that there is absolutely no bar against the institution of an application u/s 11(6) of the Arbitration and Conciliation Act, 1996.

5. In an additional affidavit filed by applicant reliance has been placed on the judgment of the Supreme court in V. Subramaniam Vs. Rajesh Raghuvandra Rao, The Supreme Court struck down the provisions of Section 69(2A) of the Indian Partnership Act 1932 as amended, in the State of Maharashtra, by Amending Act 29 of 1984. Sub-section (1) of Section 69 provides that

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.

Sub-section (3) of Section 69 provides that the provisions of Sub section (1) and (2) shall apply also to a claim of setoff or other proceeding to enforce a right arising from a contract, but shall not effect,

(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 realize the property of a dissolved firm or

(b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909 or the Provincial Insolvency Act, 1920, to realize the property of an insolvent partner.

6. The provisions of Section 69 were interpreted in a judgment of four learned Judges of the Supreme Court in Jagdish Chander Gupta Vs. Kajaria Traders (India) Ltd., That was a case where a partnership was entered into in order to carry on the business of export. An Arbitration Agreement was contained in the deed of partnership. It was alleged that one of the partners failed to carry out his part of the partnership. The Arbitration Agreement was invoked and an application was filed u/s 8(2) of the Indian Arbitration Act 1940 for the appointment of an Arbitrator. One of the defences to the application was that since the partnership was not registered, Section 69(3) of the Indian Partnership Act 1932 was a bar to a petition seeking an appointment of an arbitrator. In this Court, the two learned Judges who constituted the Division Bench differed in the application of Section 69(3) to an application for the appointment of an arbitrator. On a reference to a third Judge, it was held that the application was competent. Hon''ble Mr. Justice M. Hidyatullah, as the learned Chief Justice then was, while delivering the judgment of the Supreme Court held that the right to proceed to arbitration was founded on an agreement between the parties, the agreement being the partnership document. The Court was of the view that the application in its true sense sought to enforce rights arising from a contract and by virtue of the provisions of sub-section (3) of Section 69 an application for the appointment of an arbitrator would stand barred. The Supreme Court observed thus:

Since the arbitration clause is a part of the agreement constituting the partnership it is obvious that the proceeding which is before the court is to enforce a right, which arises from a contract. Whether we view the contract between the parties as a whole or view only the clause about arbitration, it is impossible to think that the right to proceed to arbitration is not one of the rights which are founded on the agreement of the parties. The words of Section 69(3), "a right arising from a contract" are in either sense sufficient to cover the present matter.

The Supreme Court viewed the issue both from the perspective of the contract as a whole as well as from the stand point of the arbitration agreement in isolation from the entirety of the contract. The Court held that a right to proceed to arbitration was one of the rights which was founded on the agreement of the parties. The expression "a right arising from a contract" was held to cover the matter. The Second aspect of the judgment of the Supreme Court in Jagdish Chandra''s case which is relevant to the issue involved in this case, is the construction which has been placed on the expression "other proceeding" in Sub-section (3) of Section 69. In the judgment which went in appeal to the Supreme

Court this Court had held that the expression "other proceeding" must take colour from the words which preceded it, namely "a claim of setoff". Holding that this was not a correct interpretation of Sub-section (3) of Section 69, the Supreme Court held that the word "other proceeding" in Sub-section (3) must receive a full meaning untrammeled by the words "a claim of setoff".

7. An exception has been carved out in Sub-section (3) of Section 69. Sub-Section 3 of Section 69 begins by stating that Sub-Sections 1 and 2 will also apply to a claim of set off on other proceedings to enforce a right arising under a contract. Since ''other proceeding'' includes an arbitral proceeding, the bar under Sub Section 1 applies also to an arbitral proceeding to enforce a right arising from a contract. However, Sub-Section 3 carves out an exception to Sub-Section 1 and 2 and to the prefatory part of Sub-Section 3. The exception in sub Clause (a) is that the bar will not affect the enforcement of a right to sue for dissolution of a firm or for accounts of a dissolved firm or for the realization of the property of dissolved firm. An application for the appointment of an arbitrator would fall within this exception when the claim sought to be enforced is the right to sue for dissolution or for accounts of a dissolved firm or to realize the property of a dissolved firm.

8. The judgment of the Supreme Court in Jagdish Chandra Gupta (supra) has been construed in subsequent decisions of the Court. In Smt. Premlata and another Vs. M/s. Ishar Dass Chaman Lal and others, the issue was whether a suit filed u/s 20 of the Arbitration Act, 1940 was maintainable to work out the rights given to parties under clause (a) of Sub-section (3) of Section 69 of the Partnership Act. The Supreme Court observed that Sub-section 3(a) carves out three exceptions to Sub-sections (1) and (2) of Section 69, namely, (i) The enforcement of any right to sue for the dissolution of a firm; (ii) The enforcement of a right to sue for accounts of a dissolved firm; and (iii) Any right or power to realise the property of a dissolved firm. The object is that when a partnership is dissolved, the rights of the partners are to be worked out in terms of the contract of partnership entered into between them and the rights engrafted therein. The exceptions carved out by Sub-section (3) are to enforce those rights including the right to dissolve the partnership even though it is unregistered. The Supreme Court held thus:

...reference to a private arbitration is a mode of enforcing the rights given under Clause (a) of Sub-section (3) of Section 69 of the Act and gets excluded from the main part of Sub-section (3) and Sub-sections (1) and (2) of Section 69. The enforcement of the right to sue for dissolution includes a right for reference to an arbitration in terms of the agreement of the partnership by and between the parties. Therefore, there is no embargo for filing a suit u/s 20 of the Act.

The judgment in Prem Lata was followed in a subsequent decision in Prabhu Shankar Jaiswal Vs. Sheo Narain Jaiswal and Others, In that case, a suit was brought for the dissolution of a partnership firm and for accounts in Court. The Deed of Partnership contained an arbitration clause and an application was made before the Civil Court u/s 34 of the Arbitration Act, 1940 for stay of the suit. The application was granted. An application was filed u/s 8 of the Arbitration Act for the appointment of an arbitrator. The First Respondent raised a preliminary objection on the ground that the partnership was unregistered and contended that the Petition u/s 8 of the Arbitration Act was not maintainable, in view of the provisions of Section 69 of the Partnership Act. The Supreme Court noted that Sub-section (3) of Section 69 carves out certain exceptions to the bar contained in Sub-sections (1) and (2) and in the first part of Sub-section (3) and observed as follows:

Under Sub-section (3) (a) this bar will not affect 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. Therefore, although the partnership firm may be unregistered, one partner can sue other partners for dissolution of the firm and for accounts. The words "to sue" used in Sub-section (3) (a) cannot be construed narrowly to refer only to suits for dissolution of partnership and accounts. The exception contained in Sub-section (3)(a) applies not merely to sub sections (1) and (2), but also to the first part of Sub-section (3) which deals with proceedings other than suits. Therefore, in order that Sub-section (3)(a) would apply to all these provisions, the words "to sue" in Sub-section (3)(a) must be understood as applying to any proceedings for dissolution of partnership or for accounts of a dissolved firm or to realise the property of a dissolved firm. This proceeding may be either by way of a suit or it can even be a proceeding under the Arbitration Act to secure these rights through arbitration. (Vide Smt. Premlata and another Vs. M/s. Ishar Dass Chaman Lal and others, , a judgment to which one of us was a party). Therefore, an arbitration clause in a partnership deed of an unregistered partnership can be enforced for the purpose of securing, inter alia, a dissolution and accounts of the partnership or for enforcing any right or power for obtaining the property of a dissolved firm.

9. The judgment of the Supreme Court is, therefore, authority for the proposition that the words "to sue" in Sub-section (3) (a) cannot be construed only to refer to suits for dissolution of a partnership and accounts. The expression "to sue" in Sub-section (3) (a) must apply to any proceeding for dissolution or for accounts or to realise the property of a dissolved firm. A proceeding to enforce an arbitration clause in a partnership deed of an unregistered partnership in order to seek dissolution, accounts or to realise the property of a dissolved firm has been held to be maintainable.

10. The decision in Kamal Pushp Enterprises Vs. D.R. Construction Company, holds that post award proceedings cannot be considered to be a suit or other proceedings to enforce any right arising under a contract. In Mukund Balkrishna Kulkarni v. Kulkarni Powder Metallurgical Industries (2004) 13 SCC 750 the Supreme Court held that a suit seeking a declaration of the existence of a partnership and of the shares between the parties could not be said to be made by a person suing as a partner. It was a prayer to be a partner and was,

therefore, not barred by the provisions of Section 69(1). The Supreme Court held that the right of a partner to ask for the dissolution of a firm is a right, the enforcement of which is otherwise forbidden u/s 69(1), but it is because of the exception under Sub-section (3) of Section 69 that a person suing as a partner can enforce a right under the contract for dissolution of the firm and accounts. The claim for a share in the assets of the firm is a necessary corollary to a prayer for dissolution.

11. In the statement of claim which was filed in the earlier arbitral proceedings the claim of the Petitioner was for damages for repudiation of the partnership. In paragraph 23 of the statement of claim, the Applicant averred that due to the continuing repudiation and material breach committed by the Respondent starting from 4th October 2004, the Claimant was compelled to end the partnership agreement and institute a legal action for recovery of damages.

12. After the earlier arbitral proceedings were withdrawn on 11 September 2006, the Applicant invoked arbitration agreement by a notice dated 12 September 2006. The notice of invocation states that the Applicant had lost his reputation and profits and, in addition various expenses were incurred by him to fulfill his contributions under the Deed of Partnership and the Memorandum of Understanding between the parties. The claim of the Applicant in terms of the fresh notice of invocation is in the amount of Rs. 14.52 crores, distributed among the following heads:

The notice of invocation broadly indicates the nature of the claim of the Applicant. The case of the Applicant is that he had entered into a partnership with the Respondent on 14 February 2003 for conducting entrance coaching services, computer and other related courses and ancillary software development and other incidental business as the partners would decide from time to time. By a Memorandum of Understanding dated 14 February 2003, the Respondent was to bring into the partnership, certain premises free of charge against which the Applicant was liable to pay to the Respondent an agreed sum of Rs. 1.66 lakhs per month; whether or not the firm made any profit. Upon the signing of the documents, the premises were handed over to the Applicant. The Applicant appointed an architect and contractor for the upgradation of the premises. The designs were approved. The Applicant invested a huge amount towards the upgradation of the premises and for contributing to the intellectual property of the partnership firm. The Applicant alleges that as a result of the non-co-operation of the Respondent, the Applicant was not able to open a Bank account for remitting the monthly dues to the Respondent. Since September 2003, security guards engaged by the Respondent obstructed the contractor from entering into the premises and from October 2003, the Respondent prevented the contractor and his workers from carrying out the work. The Applicant has stated that because the premises were wrongfully closed by the Respondent, the Applicant was prevented from completing the work, though he had enrolled students for the courses to be conducted in the premises. The Applicant claims that he has lost his reputation and profits, in addition to which various other expenses were incurred by him to fulfill his obligations under the Deed of Partnership and Memorandum of Understanding. It is in these circumstances, that the Applicant has sought to invoke arbitration in pursuance of the arbitration agreement contained in Clause 20 of the Deed of Partnership.

13. The contention of the Respondent is that the claim of the Applicant sounds in damages and is not for dissolution of the firm, for accounts or for the recovery of property belonging to the firm.

14. The enforcement of a right to sue for the dissolution of a firm or for accounts of a dissolved firm or to realise the property of a dissolved firm, has been carved out as an exception to the embargo enforced by Sub-section (1) of Section 69 of the Partnership Act. The claim of the Applicant proceeds on the basis that the Respondent repudiated and committed a material breach of the obligations under the deed of partnership commencing from 4 October 2004. As a result, the Applicant claimed that he was compelled to end the partnership agreement. Prima facie, at this stage, it is not possible to come to the conclusion that the basis on which the arbitration agreement has been invoked does not fall within the exception carved out by Sub-section (3) of Section 69. Arbitrability of claims falls within the jurisdiction of the arbitral tribunal. Whether or not the claims which the Applicant presents before the arbitral tribunal fall within the ambit and purview of the exception which is carved out by Clause (a) of Sub-section (3) of Section 69 is a matter which must fall for determination by the arbitral tribunal. The arbitral tribunal will have to determine as to which part of the claims that are preferred by the Applicant would fall within the ambit of a proceeding for accounts of a dissolved firm. This Court while exercising its jurisdiction u/s 11(6) cannot preempt a determination on that issue by the arbitral tribunal. Counsel appearing for the Applicant states that the Applicant will confine the claims in arbitration within the purview of the exception carved out by sub-Section 3(a) of Section 69.

15. The existence of the arbitration agreement is not in dispute. Evidently, disputes have arisen between the parties. The arbitration agreement has been validly invoked by the notice dated 12 November 2006. The Respondent by its reply dated 4 October 2006, merely stated that the Applicant was not entitled to enforce any purported right arising from the Deed of Partnership on the ground that the partnership was not registered. The Respondent stated that "the partnership has since been terminated and has come to an end without registration of the firm". On this ground, it is stated that the Applicant was not entitled to arbitration and to appoint an Arbitrator in this behalf. The Respondent failed to appoint an arbitrator, despite notice. Both the Learned Counsel have joined in stating before the Court that they would request the Court to appoint a sole arbitrator to obviate delay and expense. The Hon''ble Shri Justice B.N. Srikrishna, former Judge of the Supreme Court of India is accordingly appointed as the sole Arbitrator under the Arbitration and Conciliation Act, 1996.

16. The Arbitration Application is accordingly disposed of. There shall be no order as to costs.

