(2008) 08 BOM CK 0051

In the Bombay High Court

Case No : Arbitration Petition No''s. 364 and 373 of 2007

In Re: Arbitral Award dated 25th June, 2007 passed by the Sole Arbitrator Mr. Justice R.J. Kochar (Retd.)
 In Re: Section 34 of the Arbitration and Conciliation Act, 1996, Mahendra N. Thakkar

Date of Decision : 14-08-2008

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 34, 9
Partnership Act, 1932 — Section 32(2), 32(3), 32(4), 33

Citation : (2008) 6 BomCR 775

Hon'ble Judges : Vazifdar S.J., J

Bench : Single Bench

Advocate : Shailesh Shah, Kumana and Co., in Arb. Petn. 364/07, instructed by H. Toor and N.C. Parikh, instructed by Mansukhlal Hiralal and Co., in Arb. Petn. No. 373/07 and Alpana Ghone, Simil Purohit, Parish Jaiswal and C.D. Patel, instructed by Kanga and Co, for the Appellant; Shailesh Shah, instructed by . Kumana and Co., in Arb. Petn. No. 373/07, N.C. Parekh, Mansukhlal Hiralal and instructed by Co. and Alpana Ghone, Simil Purohit, Parish Jaiswal and C.D. Patel, instructed by Kanga and Co., for the Respondent

Final Decision : Dismissed

Judgement

Vazifdar S.J., J.—The petitioners in both the petitions seek to set aside the award made by the sole arbitrator dated 25.6.2007. The petitioner and respondent No. 1 are brothers. The first respondent in the first petition is the petitioner in the second petition and the petitioner in the first petition is the first respondent in the second petition. Respondent Nos. 2 to 6 in both the petitions are the same.

As both the petitions challenge the same award on virtually the same grounds, I will dispose of both the petitions by this common order and judgment. I will however for convenience refer to the parties as they are arrayed in Arbitration Petition No. 364 of 2007.

2. The petitioner, respondents and certain others carried on the profession of Chartered Accountants in partnership as per the terms and conditions contained in a Deed of Partnership dated 24th April, 2000. The Clauses in the partnership

Deed relevant for the present petition are as under:

2. Any partner shall be at liberty to retire from the partnership on giving atleast six calender months'' notice in writing to the other partners and on the expiration of such period the partnership shall continue with the remaining partners on the terms decided mutually by the remaining partners.

3. Mr. Gandhi and Mr. Thakkar are and are referred to hereinafter as "the senior partners",. Mr. Jayesh, Mr. Yogendra, Mr. Balse, Mr. Desai, Mr. Bhanu, Mr. Shivakumar and Mr. Shah are and are referred to hereinafter as "Partners".

10. a) The business of the partnership shall be jointly managed by the senior partners Mr. Gandhi will have overall responsibility of the practice. Mr. Thakkar will manage all administrative, financial and employee matters. There will also be regular meetings of partners for consideration of various matters concerning the conduct of the partnership business.

b) Mr. Bhanu shall be the partner in charge of the Bangalore Office and Mr. Shivakumar shall be the Partner in charge of the Delhi Office.

12. a) Any partner may retire on giving such notice as is referred to in Clause 2 hereof.

b). Every partner shall retire from the firm at the end of the firm''s financial year in which he attains the age of 65.

18. All dispute and questions in connection with the Partnership or this Deed arising between partners or their representatives shall be referred to Mr. Arun Jaswantlal of Matubhai Jamietram, Attorneys, as sole Arbitrator and in case he is not available or declines to act or resigns, then to a Single Arbitrator if the partners agree upon one otherwise to the Arbitrators to be appointed by each party to the difference in accordance with the provision of the Arbitration and Conciliation Act, 1996 or any statutory modification thereof.

3. Respondent No. 1 by his letter dated 1.12.2004 addressed to the arbitrator named in Clause 18 of the partnership deed invoked the arbitration agreement and referred the disputes which had arisen between the parties to him. He stated that the disputes mainly related to the execution of a fresh deed, powers of senior partners, violation of the terms of the deed, expulsion of four partners, etc.

4. The arbitrator named in the arbitration Clause however expressed his inability to take up the arbitration proceedings.

Respondent No. 2 filed Arbitration Application No. 69 of 2005 u/s 11 of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator. By an order dated 10.10.2005 the learned Chief Justice appointed a retired Judge of this Court as the arbitrator.

5. On 12.3.2007 respondent No. 1 filed a statement of claim before the arbitrator. The prayers in the statement of claim read as under: -

(a) the Opponent No. 5 (i.e. the petitioner) herein be declared as Senior Partner of the firm and is entitled to manage all administrative and financial matters as set out in Clause 10(a) of the said Partnership Deed.

(b) expel the Opponent Nos. 1 to 4 (i.e. respondent Nos. 2 to 5 herein) from the firm with effect from 22nd August, 2003 and/or 1st October. 2003.

(c) consequent to prayer (b) direct the Opponent Nos. 1 to 4 to repay to the firm salary and share of profit received by them from the period 22nd August, 2003 or 1st October, 2003 till date and thereafter from the date of filing of this claim till payment and/or realisation with interest @ 12% per annum from the date of respective receipt tell they return the said amount to the firm.

6. On 13.4.2007 respondent Nos. 2 to 5 filed their reply, paragraph 25 whereof reads as under:

25. These opponents, in the aforesaid circumstances, submit that Mr. M.N. Thakkar Opponent No. 5 has no right whatsoever to exclusively manage the business of the firm including administrative, financial and employee matters as alleged by the claimant and in any case the question of Mr. M.N. Thakkar managing the affairs of the firm does not arise at all, as he stands retired as a partner of the firm with effect from 1st April, 2007.

Thereafter the learned Arbitrator made and published the said award.

7. Mr. Shah, the learned Counsel appearing on behalf of the petitioner, challenged not so much the operative part of the award as the observations therein pertaining to the retirement of the petitioner under Clause 12(b) of the Partnership Deed. Mr. Toor, the learned Counsel appearing on behalf of the petitioner in Arbitration Petition No. 373 of 2007 also challenged the award in this respect. They submitted that the question of the petitioner having retired or not with effect from 31.3.2007 in view of Clause 12(b) of the Partnership Deed did not arise in the arbitration. They contended that the statement of claim did not raise this issue at all. They further contended that the statement of claim was filed on 12.3.2007. At that point of time the question of the petitioner having allegedly retired on 31.3.2007 could not have arisen and in fact did not arise for the consideration of the arbitrator.

8. They further contended that the arbitrators mandate was restricted to the period prior to 12.3.2007 and the arbitrator, having considered a period subsequent thereto by holding that the petitioner had retired with effect from 31.3.2007, had exceeded his jurisdiction and the award was therefore liable to be set aside.

This submission is unfounded. In support of prayer (b) of the statement of claim by which the first respondent sought the expulsion of respondent Nos. 2 to 5, it was contended that they had committed a serious breach of Clause 10(a) of the Partnership Deed by not accepting the petitioner as a senior partner. While rejecting this contention, the learned arbitrator observed that the contention had become totally irrelevant and was academic in view of the retirement of the petitioner from the partnership in view of Clause 12 (b) of the Partnership Deed on attaining the age of 65 years in the financial year of April, 2006 - March, 2007.

9. The learned Arbitrator furnished his reasons for coming to this conclusion. The reasons for having come to this conclusion are not relevant to the present submission. It is the conclusion per se which was challenged on the ground that the question of the petitioner''s retirement was not in issue before the arbitrator.

10. The question of the petitioner''s retirement was also considered by the arbitrator while considering the first respondents submission that the petitioner ought to have been designated as a senior partner to manage all administration, financial and employee matters. While dealing with this contention, the learned arbitrator came to the finding that the petitioner, having retired lawfully on attaining the age of 65, cannot be reinstated or restored to his erstwhile position to revise, review or reverse the decisions taken prior to the retirement of the earlier partner on 1.8.2003.

11. Prayers (a) and (b) of the statement of claim were to be considered by the learned arbitrator. In contesting this claim respondent Nos. 2 to 5 contended that the petitioner having retired with effect from 31.3.2007, there was no question of granting the said reliefs. It was necessary therefore for the arbitrator to consider the question of the petitioner''s retirement upon attaining the age of 65.

12. That it was necessary for the arbitrator to consider the question of the petitioner''s retirement with effect from 31.3.2007 is abundantly clear from prayer (a) claimed by the first respondents in the statement of claim. It is of crucial importance to note that in prayer (a), a declaration was sought that the petitioner was a senior partner of the firm and is entitled to manage all administrative and financial matters as set out in Clause 10(a) of the said Partnership Deed. The claim was not restricted upto the period ending on 31.3.2007. The claim was made in absolute terms without any limitation as to time. Indeed it is clear beyond doubt that what was sought was a declaration to this effect even after the period ending on 31.3.2007.

13. This is clear from the fact that it is in fact the contention of the petitioner and the first respondent that the petitioner did not retire and cannot be deemed to have retired from the firm with effect from 31.3.2007. I will in fact be dealing with aspect later. This was not even denied before me. Indeed it could not be denied. The same is also established from the stand taken by the petitioner and the first respondent in the said Arbitration Petition No. 140 of 2007 which I disposed of by an order dated 6.8.2008. Now if this was the contention of the petitioner and the first respondent, it was but natural and certainly open to the other respondents to contend to the contrary, which they did. They did so before the learned arbitrator, before me and in writing as is evident from paragraph 25 of the reply filed by defendant Nos. 2 to 5 before the arbitrator set out above.

14. This is one of the findings on the basis of which the learned Arbitrator

rejected the claims made by the first respondent in the statement of claim. Mr. Shah had contended that the learned arbitrator was bound to restrict his findings and his award to the circumstances and the disputes which had and could have arisen between the parties as on the date of the filing of the statement of claim viz. 12.3.2007 and therefore the finding regarding the petitioner''s retirement on a date subsequent thereto was beyond the jurisdiction of the arbitrator.

15. The claim in the statement of claim however not having been restricted upto 12.3.2007, the submission is unfounded. Indeed had prayer (a) of the statement of claim been granted, it would have had the effect of rejecting the contention of respondent Nos. 2 to 5 that the petitioner had retired with effect from 31.3.2007 and thereby the award would consequently have had the effect of entitling and permitting the petitioner to continue as a partner of the said firm even after 31.3.2007. In fact if the learned Arbitrator had not considered this contention raised by respondent Nos. 2 to 5 they would have had a valid grievance to the effect that the arbitrator had failed and neglected to consider a relevant factor. There is no question therefore of the arbitrator having taken into consideration "subsequent events" as contended by Mr. Shah.

16. Considering the nature of the claim and the defences raised, it cannot be said that subsequent events had been taken into consideration by the arbitrator. Even assuming that subsequent events could not be taken into consideration by the arbitrator, the question of the petitioner''s retirement with effect from 31.3.2007 cannot be termed a subsequent event.

17. Mr. Shah submitted that in that event the decision of the arbitrator on the question of the petitioners retirement with effect from 31.3.2007 was not merely an incidental issue but on a substantial issue. I agree. I however do not see how that aspect can be of any assistance to the petitioner and the first respondent. Indeed it militates against their stand in the above petitions.

18. I appreciate that the statement of claim was filed not by the petitioner but by the first respondent. I also appreciate the fact that the finding as to the petitioner''s retirement with effect from 31.3.2007 would affect the rights of the petitioner. It must be noted however, that it was not contended before me nor was it made a ground for challenge in either of the petitions, that the arbitrator''s finding cannot bind the petitioner for this reason. This aspect of the matter has therefore not been considered by me. Indeed the petition was argued before me virtually on the basis that the petitioner was the claimant before the learned Arbitrator.

19. As rightly pointed out by Ms. Ghone, the petitioner had filed a reply dated 8.5.2007 to the reply filed by respondent Nos. 2 to 5 before the learned arbitrator. In paragraph 7 of this reply the petitioner has repeated, reiterated and confirmed what was stated in the statement of claim dated 12.3.2007 and the rejoinder filed by the first respondent and denied all the allegations contained in the reply filed by respondent Nos. 2 to 5.

20(A). Faced with this, Mr. Shah relied upon an order dated 14.6.2007 passed by a Division Bench of this Court in Appeal No. 388 of 2007 in the said Arbitration Petition No. 140 of 2007, paragraph 1 whereof reads as under:

This is a petition u/s 9 of the Arbitration and Conciliation Act, 1996, seeking an order restraining the respondents from in any manner restraining the petitioner from acting as the partner in a firm of Chartered Accountants M/s. N.M. Raiji & Co., including occupying his office cabin, attending the day to day work of the partnership firm, attending clients on behalf of the firm and signing their audited accounts and signing cheques as per the order dated 16th December, 2004 and Consent terms dated 8th September, 2005. The petitioner has also sought an order restraining the respondents from publishing or advertising the purported retirement of the petitioner from the said firm. Lastly the petitioner has sought an order directing the respondents to withdraw the public notice published by them.

(B). Initially the petition was disposed of by an order dated 3.5.2007 by which the learned Single Judge ordered as under:

Considering the submissions raised and keeping all points open, I am of the view that the Tribunal which is already constituted by some other partner arising out of the same partnership deed as consented, by both the parties, the present issues and the disputes as raised in the petition also referred to the same Arbitrator. All points are kept open including the interpretation of the Clauses in the partnership deed in question.

(C). The Division Bench held:

Such an exercise was not open to the learned Single Judge as the reference of the disputes to arbitration was totally beyond the scope of controversy in the matter as also such a reference has to be done by the parties themselves or by the authority is specified under the Arbitration and Conciliation Act, 1996.

(D). By the order dated 6.8.2008 I disposed of the petition upon the same being remanded.

The order of the learned Single Judge was accordingly set aside and the matter was remanded.

21. I do not see how the above observation of the Division Bench is of any assistance to the petitioner. I do not read the observations as having finally concluded that the arbitrator did not have the jurisdiction to decide the question of the petitioner''s retirement with effect from 31.3.2007. Firstly, the reliefs prayed for in Arbitration Petition No. 140 of 2007 were not confined to the question of the petitioner''s retirement although the other reliefs were consequent upon a finding on that issue. More important however is the fact that these observations were made on the basis of the statement of claim alone which admittedly did not raise the question about the petitioner''s retirement with effect from 31.3.2007. However, as noted above, while resisting the claims made

in the statement of claim, respondent Nos. 2 to 5 put this question in issue. Thereupon it was in fact obligatory on the part of the arbitrator to decide the same. There is nothing in the order of the Division Bench that precluded the respondents before the arbitrators from taking a defence based on that submission.

22. Mr. Shah then relied upon paragraph 8 of the petitioner''s reply filed before the learned arbitrator which reads as under: -

With reference to paragraph 2 to 6 and 32 of the said reply of Opponent Numbers 1 to 4, dated 13th of April, 2007 this Opponent says and submits that the question of retirement of this Opponent is not referred to the present Arbitral Tribunal. In view thereof this opponent does not desire to deal with the same.

23. The petitioner''s contention in this regard cannot possibly be decisive of the matter. Relying upon this paragraph, Mr. Shah submitted that the petitioner had made it amply clear that the question of his retirement was not referred to the Arbitral Tribunal. The statement of claim itself may not have raised the issue. However, to resist the claims, it was open to respondent Nos. 2 to 5, as stated above, to raise this submission as a defence thereto, which they did, and the arbitrator was in turn bound to consider the same which he rightly did.

24. Mr. Shah also submitted that the finding regarding the petitioner having retired with effect from 31.3.2007 is in any event incorrect. The least that must be said against the submission is that the determination of this question involved a construction of the various Clauses of the Partnership Deed and that the learned arbitrator undoubtedly construed the various Clauses of the Partnership Deed and came to the conclusion. It cannot by any stretch of the imagination be said that the conclusion arrived at by the learned arbitrator was absurd. Even assuming that I interpreted the Clauses of the partnership Deed differently, it would not entitle me to substitute my views and interpretation for that of the learned Arbitrator''s. In fact while dealing with the same submission in Arbitration Petition No. 140 of 2007, I have rejected the contention raised by the petitioners albeit on different grounds and clarified that my views were only prima facie. The same however indicates that the Clauses of the Partnership Deed were required to be interpreted. There was no question of merely applying them, the same being clear only in terms of the submission made on behalf of the petitioner.

25. Mr. Toor, the learned Counsel appearing on behalf of the first respondent who is the petitioner in Arbitration Petition No. 373 of 2007, in addition to what was submitted by Mr. Shah contended that the learned Arbitrator had misinterpreted Clause 9 (a) and (b) of the Partnership Deed and Section 33 of the Indian Partnership Act, 1932. Clause 9 of the Partnership Deed reads thus : -

9. a) The Goodwill and the firm''s name of the partnership shall belong exclusively to the firm and no partner shall have any right or interest in it whatsoever either on death, retirement or expulsion from the firm or on the

dissolution of the firm or on the termination of the agreement for any cause or reason.

b) On the retirement, death or expulsion of a partner, or on dissolution of the firm no payment is made to the outgoing partner, his widow or estate for Goodwill, as it belongs to the firm and not to any individual partner.

Section 33 of the Indian Partnership Act, 1932 reads thus: -

33. Expulsion of a partner.-(1) A partner may not be expelled from a firm by any majority of the partners, save in the exercise in good faith of powers conferred by contract between the partners.

(2) The provisions of Sub-sections (2), (3) and (4) of Section 32 shall apply to an expelled partner as if he were a retired partner.

26. Mr. Toor submitted that the mere presence of the word "expulsion" in Clause 9 established that there was a power to expel a partner. He submitted that once the word expulsion is used it is sufficient to confer such a power. He further submitted that in that event, in the absence of any further details regarding the mode of exercise of such power, the Court ought to specify/provide the same.

27. This submission is unfounded for more than one reason. Firstly the arbitrator has considered and construed both, Clause 9 as well as Section 33. The learned Arbitrator held that a power to expel must be conferred on the majority under the Partnership Deed; that the power to expel is a very serious power and therefore the deed must specifically provide for the manner and circumstances under which the power is to be exercised and that the exercise of such power must be in good faith. The learned Arbitrator held that the power to expel has serious consequences and therefore cannot be inferred or surmised merely by virtue of the word "expulsion" being used in Clause 9. There being no specific power of expulsion of a partner from the firm or any specific mention of the circumstances and the manner of exercise of such power, it cannot be said that such power exists in the said deed of partnership and consequently, the arbitrator refused to infer any such power to exist in one partner to expel five partners. The learned Arbitrator held that in arbitration proceedings, it was not open to him to create a fresh contract between the partners to confer such a power.

28. The view certainly cannot be said to be absurd or unsustainable. The learned Arbitrator having construed and interpreted the provisions of the deed of partnership as well as the provisions of Section 33 of the Partnership Act in a manner which cannot be said to be unsustainable, it is not open to the Court in exercise of powers u/s 34 of the Arbitration and Conciliation Act to interfere with the same.

I am in any event in respectful agreement with the finding of the learned Arbitrator in this regard.

29. The scope and the manner in which a power to expel a partner may be provided is not stipulated either in the Partnership Act or otherwise. The agreement between the partners may confer the right to expel upon the majority of the partners. It may also confer that right upon a particular partner or partners. There is nothing in the Partnership Act that prevents them from doing so. There is also nothing in the Partnership Act that prevents the partners from agreeing to the circumstances in which the power may be exercised. Expulsion is a drastic step. The partners may therefore decide that the power that they confer upon one or more of them or the majority of them ought to be exercised only on certain grounds or for certain reasons and in certain circumstances and no other. As stipulated in Section 33 itself, the power is granted in exercise of contractual rights which exist in each partner at the time of entering into the partnership agreement or thereafter.

30. It is possible that an absolute right to expel may be granted. It may even be inferred in certain circumstances where for instance, the grant of the power to expel is not coupled with or qualified by any restriction to the exercise thereof subject of course to the statutory duty u/s 33to act in good faith.

31. It is necessary however for the partners to at least arrive at an understanding as to which one or more of them is entitled to exercise the power. It is necessary for the partners to agree to the partner or partners whose concurrence is necessary to exercise the power of expulsion of another partner or partners. In the absence of this, the grant of the power to expel is itself not complete. There is no presumption in law which operates in the absence of an agreement between the partners in this regard. There is nothing in the Partnership Act or in the present Partnership Deed which justifies or warrants the inference of such terms. There is nothing either in the Partnership Deed or the Partnership Act or in any other law which raises a presumption in this regard in the absence of a contract between the parties regarding the same.

32. A Court, Tribunal or any other adjudicatory authority including an Arbitral Tribunal cannot decide which one or more of the partners has the right to expel another partner or partners. Even assuming that respondent No. 1 is the "senior partner" that by itself would not vest in him the power to expel another partner or partners. The Partnership Deed including Clause 10 confers upon the senior partner''s specific powers which do not include the power to expel.

33. It is therefore not open to the Court or to the arbitrator to write a contract between the parties by providing for this aspect, viz. the partner or partners who may exercise the power to expel another partner or partners. Nor do I find any legal principle on the basis whereof a Court, Arbitrator or Tribunal is entitled to fill in/provide these aspects in the absence of the partners having agreed to the same.

34. In view of what I have held, it is not necessary for me to consider Ms. Ghone''s submission that the above contentions have not been raised as grounds

in the petitions.

I have not considered the validity of the award in so far as it directs the parties to execute a fresh deed of partnership. The parties are at liberty to raise the issue in the event of any of them seeking to execute the award in this regard.

35. In the circumstances both the arbitration petitions are dismissed. There shall, however, be no order as to costs.

