

(2020) 03 DEL CK 0223

In the Delhi High Court

Case No : Arbitration Petition Nio. 339, 340 Of 2019

Madhu Devi Fatehpuria

APPELLANT

Vs

Jugal Kishore Shyam Prakash & Co. & Ors.

RESPONDENT

Date of Decision : 13-03-2020

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 11(6A), 12
Indian Partnership Act, 1932 — Section 58, 59, 60

Citation : (2020) 03 DEL CK 0223

Hon'ble Judges : Jyoti Singh, J

Bench : Single Bench

Advocate : Pradeep Aggarwal, Arjun Aggarwal, Yash Raj, Jitender Vohra, N.K. Vohra

Final Decision : Allowed

Judgement

Jyoti Singh, J

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking appointment of an Arbitrator to adjudicate the disputes between the parties.

2. Respondent no.1 is a Partnership Firm registered under the Indian Partnership Act, 1932 with the Registrar of Firms, Delhi, running the business of trading of textile products, amongst other things. As per the profit-sharing ratio in the partnership firm, petitioner has 40% share and respondent nos.2 to 4 have a combined share of 60%.

3. As per the petitioner the parties herein entered into a Partnership Deed dated 18.05.1992 which contains an Arbitration Clause and which reads as under :-

"12. ARBITRATION: In case of any dispute or disputes among the partners regarding the interpretation of this deed or with regard to other affairs pertaining to this partnership business, the same shall be referred and settled with an arbitrator mutually agreed upon by the partners."

4. It is averred in the petition that the petitioner had invested huge sums of money in the Firm which is evident from the Statement of Accounts of respondent no.1. It was the practice to provide interest at the rate of 12% on the amounts invested by the partner as per Clause 6 of the Partnership Deed, on annual basis. The grievance of the petitioner as averred in the petition is that since the year 2009, respondents have not shared copies of the account of the Firm, despite several requests. Copies of the audited balance sheets, ITR, Sales Tax and GST Returns as well as other documents have also not been shared with the petitioner. The respondents unilaterally stopped paying interest at the agreed rates as well as the share in the profits in the manner provided in the Deed, to the petitioner. It is also the grievance that the respondents have been carrying out parallel businesses and diverted the business activities of respondent no.1, exploiting the Goodwill for their personal gains. It is further averred in the petition that the petitioner served a notice dated 10.12.2018 invoking Arbitration when all other remedies for peaceful and amicable Dissolution of the Partnership and rendition of accounts failed. The claims of the petitioner as set out in the petition are as under :

"4.14 .1. The capital invested by the Petitioner in the Partnership business.

4.14.2. Petitioner's share of profits of the partnership business as well as the parallel businesses being operated by the respondents, wherein the business of the partnership has been diverted.

4.14.3. Petitioner's share of goodwill of the partnership business as well as the parallel businesses being operated by the respondents, wherein the business of the partnership has been diverted.

4.14.4. Interest on the abovementioned amounts in terms of Clause 6 of the Partnership Deed."

5. Learned counsel for the petitioner contends that the petitioner has proposed the name of an Advocate to be appointed as the Arbitrator so that the disputes could be adjudicated. However, respondent nos.2 and 3 sent a reply dated 17.01.2019 and did not accept the appointment of the proposed Arbitrator. The respondents have failed to propose the name of their nominee Arbitrator. Having exhausted all other means to redress her grievances, the petitioner has filed the present petition.

6. Reply was filed on behalf of respondent nos.1 to 3. Respondents have taken certain preliminary objections. The first objection is that the present petition is not maintainable as there is no existing and valid Arbitration Agreement between the parties. It is argued that petitioner has concealed that the Partnership Deed dated 18.05.1992 was novated and superseded by a Partnership Deed dated 01.04.2006, which does not contain an Arbitration Clause. The Deed of 18.05.1992 does not exist any more and the present petition is thus not maintainable.

7. It is further contended that for the last 13 years, all records of respondent no.1 are being maintained in accordance with the Deed dated 01.04.2006 and even the profits and losses of the Firm are being shared as per the said Deed. It is vehemently contended that the petitioner has deliberately concealed the said Partnership Deed from this Court and a party who does not come to the Court with clean hands would in any case not be entitled to any relief.

8. It is next contended that the 2006 Partnership Deed is not a mere Codicil or an amendment but a new partnership deed on a Stamp Paper of value of Rs.300/-. The Deed nowhere contains any covenant which indicates that earlier terms of the Partnership Deed of 1992 shall remain intact.

9. The next contention of the respondents is that this Court would lack the Territorial Jurisdiction to entertain the petition for the reason that even assuming that the partnership deed dated 18.05.1992 is valid and subsists, Clause 12 nowhere mentions that the seat or the venue of Arbitration would be New Delhi. The Deed was itself executed and signed at Coimbatore, Tamil Nadu. The Stamp Papers were also purchased at Coimbatore, Tamil Nadu and Clause 2 of the Deed clearly specifies that the principal place of business would be Coimbatore while only the Branch Office is at Delhi. The Firm itself is assessed to Income Tax at Tamil Nadu since its inception and till date. Mere registration of the Firm at Delhi will not confer jurisdiction on this Court to entertain the petition as it was a mere inadvertent error on the part of the partners to have submitted the Partnership Deed dated 18.05.1992 at the time of applying for registration with the Registrar, Delhi.

10. It is next contended that even otherwise the claims of the petitioner are hopelessly time barred and there is no live claim which is arbitrable. The petitioner is seeking reliefs which relate back to the year 2009 and cannot be entertained at this stage. Besides this, the main reference that is sought is regarding the relief of Dissolution of the Partnership Firm which clearly falls outside the ambit of the Arbitration Clause being relied upon by the petitioner.

11. It is further contended that the other relief that is sought to be referred for Arbitration is a claim of interest on the fixed capital. The said relief would not arise under the Partnership Deed of 18.05.1992 as the terms relating to the payment of interest on the fixed capital were introduced for the first time only in the Partnership Deed of 01.04.2006.

12. Learned counsel for the petitioner in rejoinder had initially vehemently contended that the petitioner has not suppressed the partnership dated 01.04.2006. The stand was that the petitioner does not even recall having signed any such Partnership Deed and the only Deed executed and signed by her was the Deed dated 18.05.1992. To fortify the stand of the petitioner, learned counsel had sought to rely on the Certificate of Registration of the Registrar of Firm dated 05.01.2007 to contend that if the Deed dated 01.04.2006 existed, the same would have been mentioned in the Registration Certificate. However, after some

hearing, counsel for the petitioner admitted that the signatures on the Partnership Deed 2006 were of the petitioner and gave up this argument. This has been so recorded by the Court in the order dated 27.11.2019.

13. In view of the said stand taken by the learned counsel for the petitioner, this Court need not enter into the controversy of existence of the Partnership Deed dated 01.04.2006 which was vehemently contested in the rejoinder filed by the petitioner as well as during the initial part of the arguments.

14. In so far as the objection of the respondents regarding the Territorial Jurisdiction of this Court is concerned, it is contended by the petitioner that the partnership firm is registered in Delhi with the Registrar of Firms, Delhi and a Certificate of Registration has been placed on record of this Court. It is argued that Section 58 of the Indian Partnership Act, 1932 provides that the Registration of a Firm may be effected by applying to the Registrar of the area in which any place of business of the firm is situated and it will categorically be accompanied by a statement indicating the place or principal place of business of the firm and shall be signed by all partners or their authorized agents. In the present case, the partners had clearly stated that the principal place of business was Delhi. It is further argued that Section 59 of the said Act provides that when the Registrar is satisfied that provisions of Section 58 had been complied, he shall record an entry of the statement in the Register of Firms. Section 60 provides for recording of any alterations in the Firm's name and principal place of business. The argument is that the principal place of business is shown as Delhi in the Register of Firms and no amendment has been carried out in Form 'A', till date. It is argued that one of the disputes sought to be referred is with regard to drawing up of a Dissolution Deed and thus the principal place of business being Delhi, this Court will have the exclusive jurisdiction to entertain the petition. Reliance is placed on the judgment in the case of Gujarat Insecticides Ltd. v. Jainsons Minerals 2009 (107) DRJ 139 (DB). It is also argued that the entire business of respondent no.1 is carried out from Delhi office which has permanent staff employed therein. The godowns are also located at Delhi and the address of the answering respondents as evident from the affidavit filed herein is also Delhi. Even the Partnership Deed dated 01.04.2006 does not mention the alleged address at Coimbatore.

15. It is vehemently denied by the petitioner that the original Partnership Deed dated 18.05.1992 was novated or superseded. It is submitted that the Deed dated 01.04.2006 has been only altered to the extent of interest payment terms and nothing more. This is evident from a reading of Clauses 12 and 13 of the Partnership Deed dated 18.05.1992 which provided that any provision of the said Deed could be altered or varied with the mutual consent of the parties and the provisions so altered shall form part of the Deed as soon as reduced into writing or signed by the partner. Para 2 of Clause 4 of the Deed dated 01.04.2006 clearly mentions that the parties had decided to alter the clauses relating to payment of interest on capital to the working partner with effect from 01.04.2006. Thus, the

Deed of 01.04.2006 is only a Supplementary Deed to the earlier Deed, altering it to the extent of interest on the fixed capital. It neither novates nor supersedes the same. Therefore, the Deed of 18.05.1992 is still valid and subsisting and the Arbitration Clause incorporated therein governs the parties.

16. I have heard the learned counsels for the parties and examined their contentions.

17. It is a settled law that while examining a petition under Section 11(6) the Act the Court has to examine only the existence and validity of the Arbitration Agreement. This is clear from a bare reading of Section 11(6A) of the Act which reads as under :-

"[(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."

18. The Supreme Court has in a recent decision in the case of M/s. Mayavati Trading Pvt. Ltd. vs. Pradyut Deb Burman, (2019) 8 SCC 714 has reinforced this position of law. Relevant para of the judgment is as under :

10. This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment [United India Insurance Co. Ltd. v. Antique Art Exports (P) Ltd., (2019) 5 SCC 362 : (2019) 2 SCC (Civ) 785] , as Section 11(6-A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment in Duro Felguera, SA [Duro Felguera, SA v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] - see paras 48 & 59 [Ed.: The said paras 48 & 59 of Duro Felguera, SA v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764, for ready reference, read as follows:"48. Section 11(6-A) added by the 2015 Amendment, reads as follows:"11. (6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement."(emphasis supplied)From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect-the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple-it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.***59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP & Co. v. Patel

Engg. Ltd., (2005) 8 SCC 618 and National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117. This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists-nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected."] .

19. The only question therefore that the Court has to decide is whether there exists a valid and subsisting Arbitration Agreement between the parties herein.

20. As mentioned above, initially the petitioner had taken a stand that the Deed dated 01.04.2006 was never executed and signed by the petitioner and thus, there was a complete denial of such a Partnership Deed. However, subsequently, the petitioner had candidly accepted that the said Deed was duly signed by her. It is however undisputed between the parties that the Deed dated 01.04.2006 does not have an Arbitration Clause. The stand of the petitioner is that the Deed of 01.04.2006 is only supplementary to the original Deed dated 18.05.1992 altering it only to the extent of incorporating a clause with regard to the interest on fixed capital while all the other provisions of the original Partnership Deed including the Arbitration Clause remain unaltered and were subsisting. Per contra, the stand of the respondent is that the Partnership Deed incorporated new covenants and was a fresh Partnership Deed executed on a fresh Stamp Paper and the original Partnership Deed stood novated / superseded.

21. I have perused the Partnership Deed dated 18.05.1992. Clause 12 of the said Deed reads as under :

"12. ALTERATION IN DEED: Any provision of this deed may be altered, varied, deleted or amended or ended with the mutual consent of all the partners in writing and the provisions so altered shall form part of this partnership deed as soon as the same is reduced into writing and signed by the partners hereinabove mentioned and attached to this deed of partnership."

22. This clause clearly enabled the partners to alter, vary or amend any of its provision by mutual consent and in writing.

23. I have also perused the Partnership Deed dated 01.04.2006. Para 2 of Clause 4 reads as under :

"And whereas the parties have decided to alter the clauses relating to payment of interest on capital to the working partners with effect from 1/4/2006."

24. In my view, the petitioner is right in its contention that a bare reading of the Clause indicates that while executing the said Deed, the parties only intended to alter the Deed relating to payment of interest on fixed capital to the working partners, with effect from 01.04.2006. This intent is clear from the use of the word 'alter'. If this was a fresh Deed with an intent to novate the earlier deed the parties would not have used the word 'alter'. This is further fortified by the next

para in the Deed which reads as under :

"<unreadable> expedient by the parties to reduce the revised terms and conditions · of the partnership in writing by a formal instrument of partnership and thereby regulate and control the relationship between the parties inter se."

25. Since there is no novation of the original Partnership Deed in my view, the Arbitration Clause in the said Deed is subsisting and valid. This contention of the respondent is thus rejected and the petition is maintainable under Section 11(6) of the Act.

26. In so far as the Territorial Jurisdiction of this Court is concerned, the petitioner is right in its contention that the partnership firm is registered with the Registrar of Firms at Delhi. Provisions of Section 58 to 60 of the Indian Partnership Act, 1932 clearly envisage the registration at the place where the principal place of business of the firm takes place. The requirement of law under the said provisions mandates the partners to disclose in the requisite Form, the address of the principal place of business. The Certificate of Registration of the partnership firm placed on record by the petitioner indicates that the firm is indeed registered at Delhi and thus, there is a presumption that the Registrar would have verified the principal place of the firm being at Delhi, before according registration.

27. It is significant to note that the respondents have not denied the fact that the Partnership Deed of 18.05.1992 is registered at Delhi. In fact, the stand is that at the time of registering the Deed at Delhi in 2007, the respondents had inadvertently furnished the 1992 Deed instead of the 2006 Deed. This plea of inadvertent error cannot be accepted by the Court at this stage. Petitioner has pleaded that the Form 'A' shows only the Delhi address of the firm and this pleading is unrebutted by the respondents. Respondents have not placed any material on record to show that they have filed any rectification application before Registrar of Firms from 2007 till filing of this petition, to change the record.

28. The Arbitration Clause as reproduced above does not mention either the seat or the venue of Arbitration. In the absence of the seat or the venue having been agreed upon between the parties, the registration of the firm at Delhi in my view would be a factor to determine the Territorial jurisdiction of this Court, more particularly looking at the nature of disputes sought to be referred. Thus, this Court would have Territorial jurisdiction to entertain the present petition and this objection of the respondents cannot be sustained.

29. Respondents have also objected to the claims of the petitioner being time barred. It has been clearly held by the Supreme Court in *Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd.*, (2020) 2 SCC 455 and *NTPC Ltd. v. Siemens Atkeingesellschaft*, (2007) 4 SCC 451 that the dispute with regard to the claims being time barred would be in the domain of the Arbitral Tribunal and thus, this issue is left open to be decided by the Arbitral Tribunal, if raised therein

by the respondents.

30. This Court does not find merit in the contention of the respondents that the disputes sought to be referred by the petitioner relate to the Dissolution of the Firm and are beyond the ambit of the Arbitration Agreement. The disputes sought to be raised by the petitioner have been crystalized in the petition and have been extracted above. A perusal of the claims sought to be raised shows that there are varied disputes raised by the petitioner which includes the rendition of accounts, furnishing of requisite documents relating to the business of the firm, interest on fixed capital, etc. In any case, the issue of arbitrability of Claims would be in the domain of the Arbitral Tribunal.

31. In view of the above, the present petition deserves to be allowed.

32. I hereby appoint Mr. Anjum Javed, Advocate to be the Sole Arbitrator to adjudicate the disputes between the parties.

33. The address and mobile number of the learned Arbitrator is as under:

Mr. Anjum Javed, Advocate

A-15, Nizamuddin West Back Side,

Lower Ground Floor,

New Delhi-110013

Mobile: 9999596970

34. The learned Arbitrator shall give disclosure under Section 12 of the Act before entering upon reference.

35. Fee of the Arbitrator shall be fixed as per Fourth Schedule of the Act.

36. Copy of this order be sent to the learned Arbitrator for information.

37. Petition is allowed in the aforesaid terms.

38. The respondents are at liberty to raise the objection of the claims of the petitioner being time barred as well as the arbitrability of the disputes before the Arbitral Tribunal.