
(2009) 08 DEL CK 0405

In the Delhi High Court

Case No : Arbitration Petition 136 of 2006

Mangla Advisory P. Ltd.

APPELLANT

Vs

Cybizcall (International) and Another

RESPONDENT

Date of Decision : 31-08-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(4), 11(5)
Limitation Act, 1963 — Article 137, 14
Partnership Act, 1932 — Section 69

Citation : (2010) 1 ILR Delhi 331

Hon'ble Judges : S.N. Dhingra, J

Bench : Single Bench

Advocate : Kirti Uppal, for the Appellant; Sanjeev Narula, for the Respondent

Final Decision : Dismissed

Judgement

Shiv Narayan Dhingra, J.—The petitioner by this petition u/s 11(5) of the Arbitration & Conciliation Act, 1996 ("the Act", for short) has prayed for appointment of an arbitrator for adjudication of disputes between the parties. The petition has been filed by Mangla Advisory P. Ltd., (petitioner herein) a company claiming to have a division in the name of Investments Bank India.Com. The arbitration clause relied upon is contained in an agreement dated 20th June 2001. It is submitted that there was an initial agreement dated 6th May, 2001 (referred to as the first agreement) which merged into second agreement dated 20th June, 2001. After giving details of transactions between the parties, it is submitted by the petitioner that the petitioner performed its part of obligations under the second agreement whereas the respondent failed to fulfill its obligations and because of respondent's defaults, a dispute arose. The respondent did not pay heed to various communications, meetings, requests, and failed to comply with the terms of the agreement. The petitioner invoked arbitration clause vide notice dated 15th October 2002 served through an advocate of petitioner. By this notice the petitioner also suggested names of two arbitrators and asked respondent to give consent for any one of the two to act as

the arbitrator. The respondent gave reply to this notice on 17th February 2003 declining to accept any of the two as arbitrator and hence this petition for appointment of an arbitrator.

2. The petitioner has set out the disputes which arose in the petition and has asked the Court to appoint an arbitrator. In reply to the petition, respondent has taken the stand that the petition was barred under Article 137 of the Limitation Act read with Section 11 of the Arbitration & Conciliation Act, 1996. It is submitted that the dispute itself had also become barred by time and was a stale dispute. The petition was also not maintainable because respondent had no arbitration agreement with Petitioner Company. The petition was also not maintainable because of Section 69 of the Partnership Act and was liable to be dismissed.

3. It is submitted by respondent that the agreement dated 6th May 2001 and 20th June 2001 were not entered into with the petitioner company. The agreement dated 6th May, 2001 was entered into with InvestmentbankIndia.com. This agreement was superseded by the agreement dated 20th June 2001 which was again entered into between InvestmentbankIndia.com, a partnership firm registered in India and respondent. It is submitted by respondent that it was misrepresented to respondent that InvestmentbankIndia.com was a registered partnership firm whereas the InvestmentbankIndia.com was not a registered partnership firm at all. Thus, no suit or claim was maintainable by an unregistered partnership firm against respondent neither the proceedings under Arbitration & Conciliation Act, 1996 were maintainable by an unregistered partnership firm and the award passed in favour of an unregistered partnership firm would be null and void. It is also submitted that the contract/ agreement dated 21st June 2001 specifically provided that it was a non assignable contract and the rights under the contract could not be assigned without prior written consent of either of the parties. Thus, the plea of the petitioner that the partnership firm was taken over by Petitioner Company was not entertain-able and the contract being not assignable, the arbitration agreement and the contract would not survive.

4. It is argued by respondent that the notice for appointment of an arbitrator was served by the petitioner on 15th October 2002 and if the notice was assumed to have been received by respondent on 17th October 2002, one month's period for appointment of arbitrator, as provided u/s 11 of the Act, expired on 16th November 2002. The period for filing a petition/application u/s 11 of the Act is three years and this period expired on 16th November 2005 whereas the present petition u/s 11 has been filed by petitioner on 14th February 2006. Thus, the petition was barred by limitation. It is also submitted that for the same reasons, the dispute between the parties itself had become stale and barred by time.

5. It is not disputed by petitioner that InvestmentbankIndia.com was not a registered partnership firm. In fact, no document has been placed on record by petitioner showing the identity of InvestmentbankIndia.com. In agreement dated

6th May 2001, the identity of InvestmentbankIndia.com has not been disclosed at all while in agreement dated 21st June 2001, InvestmentbankIndia.com has been described as a registered partnership firm. In none of the two agreements, it has been mentioned that InvestmentbankIndia was a division of Mangla Advisory Private Limited. The petitioner has submitted that petitioner company, by a board resolution has taken over all assets and liabilities of InvestmentbankIndia.com however, the petitioner has not placed on record a single document showing as to what was the identity of investmentbankindia.com prior to its taking over by the petitioner company; how it came into existence. In agreement dated 6th May 2001, it has been shown as an arranger while in agreement dated 20th June 2001 it has been shown as an advisor.

6. Even if it is presumed that investmentbankindia.com was a partnership firm whose assets and liabilities had been taken over by the petitioner company, the petitioner company could not have got better rights than what investmentbankindia.com would have against respondent. Since investmentbankindia.com was an unregistered partnership firm, no proceedings could have been filed or initiated by investmentbankindia.com against respondent and the petitioner, having taken over the assets and liabilities of investmentbankindia.com, could not have got better rights.

7. This Court in Himachal Pradesh Cooperative Group Housing Society v. Umesh Goel 2007 X AD(Delhi) 409, had considered the import of Section 69 of Indian Partnership Act and observed as under:

3. The requirement of registration of a partnership is not an empty formality. It serves an extremely far reaching function. In the event of a dispute the aggrieved party should be able to easily ascertain the names and details of persons who would eventually be liable of recoveries against the firm. Unlike a company a partnership firm is not a distinct legal entity and its partners remain personally liable for all its debts subject to their inter se contract. Given the relative ease with which a firm can be registered, failure on the part of the partners to take requisite action cannot but be viewed with suspicion; namely that they intend to unethically and illegally defraud their creditors. To fully appreciate all the aspect of the introduction of this statutory requirement we have reproduced in extension the relevant extracts from the Report of the Special Committee which recommended these legislative changes. Every interpretation of Section 69 of the Partnership act must give effect to these objectives, unless the plain language makes it impossible to do so. In Virendra Dresses Vs. Varindra Garments, Sultan Singh, J of this Court had held that a suit for injunction on the grounds of passing off was maintainable notwithstanding non registration of the firm because the right sought to be enforced is not stern from a contract but was available in common law. There is now high authority for this proposition in terms of M/s. Raptakos Brett and Co. Ltd. Vs. Ganesh Property, .

7. It is well settled that a decree obtained by an unregistered partnership is a nullity, and all such proceedings are devoid of jurisdiction, and objections in this regard can be raised in even at the stage of Appeal or in Execution. (See K.K.A. Ponnuchami Goundar Vs. Muthusami Goundar and Another, , A.T. Ponnappa Chettiar and Others Vs. Bodappa Chettiar and Others, , Shriram Sardarmal Didwani Vs. Gourishankar alias Rameshwar Joharmal, , In the matter of In Re: Abani Kanta Pal, and definitively in Seth Badri Prasad and Others Vs. Seth Nagarmal and Others,).

8. In Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta, there was a delay of about ten years from the date of the accrual of the cause of action and the making of the Reference. The Supreme Court held that "the proceedings before the Arbitrator are like civil proceedings before the Court within the meaning of Section 14 of the Limitation Act." We are also in respectful agreement with similar views expressed by a Division Bench of this Court in Vanita Gambhir and Others Vs. District Judge and Others, , where it has been enunciated that (a) arbitral proceedings are akin to civil proceedings are (b) that Section 69 bars adjudication of claims even through arbitration unless it is for the dissolution of the firm.

8. Thus, it is settled law that if a firm is desirous of having its own claim adjudicated either by an independent suit or as a claim or counter claim before an arbitrator, it must be a registered firm on the date when such an action is brought or initiated before the Court or the arbitrator. I, therefore, consider that the present petition filed u/s 11 of the Act by the petitioner company claiming to have acquired the interest of investmentbankindia.com, an unregistered partnership firm, is not maintainable in view of Section 69 of the Partnership Act.

9. The respondent should also succeed on the issue of limitation. Section 11(4) of the Arbitration & Conciliation Act, 1996 provides that where a party fails to appoint an arbitrator within 30 days from the receipt of request, the appointment shall be made, upon on the request of such a party by the Chief Justice or any person designated by him. Thus, the cause of action for filing a petition/application u/s 11 of the Act for requesting the Chief Justice to appoint an arbitrator arises after 30 days of receipt of notice by the other party for appointing an arbitrator or for according consent to the name given by the claimant. It is the petitioner's own case that notice dated 15th October 2002 was served upon respondent. A perusal of this notice would show that the petitioner vide this notice claimed an amount of US \$ 2,51,250 and Rs. 11,92,000 as on 15th October 2002, towards fees and other charges. The petitioner also claimed damages to the tune of Rs. 25 lac, and after raising this claim, petitioner invoked the arbitration clause contained in the agreement and suggested the names of Shri S.S. Grewal and Shri M.N. Rao, the two retired High Court Judges and asked respondent to agree on one of the names and give consent within 20 days from receipt of notice failing which legal proceedings shall be initiated. It is obvious that the cause of action for filing the petition u/s 11 of the Act in this case arose

when the respondent failed to give consent to one of the names within 30 days of receipt of the notice. The contention of the petitioner is that the cause of action for filing application u/s 11 of the Act arose on the date the reply of respondent was received by the petitioner i.e. 17th November 2003. The limitation would not start running from the date of receipt of reply by petitioner. A respondent may not at all respond to the notice of claimant invoking arbitration clause, but that would not mean that limitation would remain open and the petitioner would be at liberty to file an application/petition u/s 11 of the Act after any number of years on the ground that it did not receive a reply from respondent. The reply may be given by respondent after 4/5 years, the limitation cannot be counted after 4/5 years of the issue of notice. The limitation to file an application/ petition u/s 11 of the Act would start from the date the right accrued to the petitioner to move the Court of Chief Justice for appointment of an arbitrator u/s 11. In view of Section 11(4) of the Act, this right accrued to petitioner after one month of receipt of notice by respondent. One month given for appointment of an arbitrator expired on 18th November 2002. The petition could have been filed within three years of the arising of the cause of action in view of Article 137 of the Limitation Act which provides a limitation of three years for all such applications. The present petition was filed after three years and hence this petition itself is barred under Limitation Act.

10. The cause of action in respect of claim accrued to the petitioner on or before 15th October 2002 when the petitioner served a notice on the respondent alleging a liability upon the respondent towards petitioner of the amount stated in the notice. The petitioner did not respond to the notice within the period specified by the petitioner in the notice. Even thereafter, when respondent replied to the said notice, it did not admit the liability put forth in the notice. The limitation for recovery of any amount is three years. This limitation starts running from the date of cause of action. Presuming that the cause of action arose on 15th October 2002, the action qua respondent for recovery could have been brought within three years. The petition u/s 11 of the Act was filed after lapse of three years and by that time the claim itself has become barred by limitation.

11. It is argued by counsel for petitioner that the Court should not decide the issue of limitation and it should be left open to the arbitrator. However, I consider that in view of the judgment of the Supreme Court in *S.B.P. and Co. Vs. Patel Engineering Ltd. and Another*, and *Shree Ram Mills Ltd. Vs. Utility Premises (P) Ltd.*, this Court has an obligation to decide the issue about the claim being live or not; whether there was an arbitration clause between the parties or not; and whether the petition itself was maintainable or not. For the purpose of taking a decision on a petition/ application u/s 11(5) of the Act for appointment of an arbitrator, it is incumbent upon the Court to decide all these issues.

12. In view of my foregoing discussion, the present petition u/s 11 of the Act filed by the petitioner is not maintainable. The petition is hereby dismissed. No

orders as to costs.