

(2013) 03 BOM CK 0180

In the Bombay High Court

Case No : Arbitration Application No. 278 of 2012

Mr. Jayesh Dinesh Shah and Others

APPELLANT

Vs

Kaydee Family Trust and Others

RESPONDENT

Date of Decision : 06-03-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 2(h), 40, 45

Citation : (2013) 03 BOM CK 0180

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

Bench : Single Bench

Advocate : Yasmin Tavaría, for the Appellant; P.K. Sandhani for Respondent Nos. 1 to 3, Ms. Manorama Mohanty instructed by M/s. S.K. Srivastav and Co. for Respondent Nos. 1 to 3 and 4 to 6 and Mr. Chetan Kapadia and Murlidhar Gadge instructed by M/s. S.K. Srivasta and Co. for Respondent Nos. 4 to 6, for the Respondent

Judgement

R.D. Dhanuka, J.—By this application filed u/s 11 of the Arbitration and Conciliation Act, 1996 (hereinafter "the Act" for short), applicants seek appointment of arbitrator invoking Clause-20 of the Deed of Kaydee Family Trust executed on 6th April 1983 which is at Exhibit-A to the application. Clause 20 of the said Trust Deed reads as under:

20) subject to contents of para 9 of this trust deed, every dispute or differences regarding the interpretation of any of the clauses or provisions or the contents of this Trust Deed or between the Trustees, or the Trustees and beneficiaries, or the beneficiary inter-se regarding the rights, titles or interest flowing or arising from this Trust Deed or consequential thereto shall be resolved in pursuance of the provisions of Indian Arbitration Act, 1940 or any other Statute in force in its place and the decision of arbitrator or arbitrators, as the case may be, shall be final and binding to the parties to such arbitration.

The applicants are beneficiaries of the first respondent trust which is a private family trust formed by Deed of Trust dated 6th April 1983 for the benefit of six

minors. Out of six minors, three of whom, are the applicants, are now MAJOR. Respondent Nos. 4 to 6 who are also beneficiaries under the said Deed of Trust dated 6th April 1983 are also major and are first cousins of the applicants.

2. It is the case of the applicants that the respondents have leased out the trust premises and are not paying the due share of the applicants from the amounts received by way of lease rent and/or compensation. Dispute arose between the parties. The applicants, vide their Advocate's notice dated 23rd October 2012 to the respondents, requested for appointment of sole arbitrator by invoking clause-20 of the Trust Deed. The respondents vide their Advocate's reply dated 31st October 2012, raised various issues about the control and management of the first respondent trust. The respondents, however, did not deny the rights of the applicants to invoke arbitration clause in the said reply. As the respondents refused to appoint an arbitrator, applicants have filed the present application u/s 11(6) of the Act for appointment of arbitrator.

3. Mr. Samdhani, the learned senior counsel appearing for respondent Nos. 1 to 3 and Mr. Kapadia, the learned counsel appearing for respondent Nos. 4 to 6 opposed this application on various grounds.

4. The learned counsel submits that the present application filed u/s 11 is not maintainable on the ground that applicants were not signatories to Trust Deed dated 6th April 1983. Reliance is placed on Section 2(h) of the Act which defines party as under:

2(h) "party" means a party to an arbitration agreement.

5. The learned counsel also placed reliance upon Section 7 of the Act in support of their plea that arbitration agreement has to be in writing and shall also be signed by the parties. The learned counsel submits that as the applicants were not admittedly signatories to the Trust Deed, thus not being party to the arbitration agreement and therefore present application for appointment of arbitrator u/s 11 is not maintainable.

6. Mr. Kapadia, the learned counsel appearing for respondent Nos. 4 to 6 invited my attention to Section 40 and Section 45 of the Act in support of his plea that in case of death of a party to the arbitration agreement, arbitration clause would survive and can be invoked by the legal heirs or representatives of the deceased. Reliance is placed on Section 45 in support of the plea that in case of the proceedings pending before the judicial authority, request can be made by the parties to the agreement or parties claiming through or under him to refer the parties to arbitration. The learned counsel submits that intention of legislature is clear that the parties claiming through a party to arbitration agreement can apply for referring the dispute to arbitration u/s 45, in case of the arbitration provided in Part-II of the Act, whereas no such provision for invoking arbitration clause through a party claiming through a party to arbitration agreement is contemplated in Section 7 r/w Section 11 of the Act.

7. The learned counsel submits that in any event, applicants admittedly at the time of execution of Trust Deed by the Settlor, were minor and were incapable of entering into any contract, thus, no reliance on such Trust Deed can be placed by the applicants. The learned counsel also submits that in so far as the dispute inter-se between the applicants and respondent Nos. 4 to 6 is concerned, the same also cannot be referred to arbitration, as there is no mutuality between the applicants and the respondents. The learned counsel submits that as the issue of existence of arbitration agreement is raised by the respondents and also whether claims as would be made by the applicants, would be arbitrable or not, such issue has to be decided by the Chief Justice or his designate u/s 11 of the Act in view of the law laid down by the Supreme Court in case of S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, . The learned counsel placed reliance upon paragraphs 41 to 47 of the said judgment.

8. The learned counsel also placed reliance upon the judgment of Privy Council in case of MIR Sarwarjan Vs. Fakhruddin Mahomed Choudhuri reported in XXXIX Indian Law Reporter 232 in support of his plea that for want of mutuality between the applicants and other beneficiaries under the Trust Deed, matter cannot be referred to arbitration. Reliance is placed on the Judgment of Privy Council in case of 7 CWN 441 (Privy Council) in support of the plea that any contract entered into by a minor would be a void contract. The learned counsel placed reliance upon the judgment of Delhi High Court in case of Ms Chhaya Shriram vs. Deepak C. Shriram and others delivered on 19th February 2008 u/s 11 of the Act in support of the plea that Trust Deed is a contract between Settlor and Trustees and arbitration clause contained in such Trust Deed is not binding on the beneficiaries. Paragraphs 3, 7, 8 and 9 of the said Judgment read thus:

3. The Trust Deed contained an Arbitration Clause which reads as under:

All disputes and questions whatsoever which shall arise either during the continuation of this Trust between the Settlor, Trustees and Beneficiaries to the income or to the Corpus of their respective representatives or any of them touching this Deed or the construction or the application thereof or any clause or thing herein contained or any account, calculation or dividend or division of assets or liabilities to be made hereunder, as to any act, deed or omission of any one of the TRUSTEES or as to any other matter in any way relating to the Deed of Trust or any affairs thereof or the rights, duties and liabilities of any person under this Deed shall be referred to a single arbitrator in case the parties agree upon or otherwise to two arbitrators, one to be appointed by each party to the dispute, in accordance with and subject to the provisions of Indian Arbitration Act or any statutory modification thereof for the time being in force. In case the two arbitrators so appointed do not agree upon the matter, it shall be referred to an umpire to be appointed by the two arbitrators representing each of the parties to the dispute.

7. As per the provisions of Section 7, an Arbitration Agreement is an agreement by the parties to submit to arbitration all or certain disputes. Thus, wherever one

party invokes Arbitration Clause vis-?-vis other party, both parties must have agreed to submit all their disputes to the arbitration. An Arbitration Agreement to be a valid agreement, the parties to the agreement must be ad-idem to the fact that if there is a dispute between the parties, the same shall be referred to the Arbitrator.

8. It is not disputed that none of the parties to this application were signatories of the Trust Deed and the only signatories to the Trust Deed were settler and Trustees. The beneficiaries were not signatories to the Trust Deed. The question arises, can a person reaping benefit under the Trust, becomes bound by the Arbitration Clause given in the Trust and his disputes with the other beneficiaries is to be referred in terms of the Arbitration Clause? There is no doubt that a beneficiary can have benefits of the Trust only in accordance with the terms of the Trust and in the same ratio and proportion which is provided under the Trust. But he is granted benefits by the Trust not out of any contract between him and the Trustees and the Settlor. He is not made beneficiary out of his choice but because of the desire of the Settlor. The Trust is not a contract between settler and the beneficiary. A Trust is a contract between settler and Trustees, where settler places some property in the hands of Trustees and gives power to the Trustees to manage the property in a specified manner and to give benefit of the property to certain persons. A Trust may be a Private Trust or a Public Trust and a similar arbitration clause can be there even in a Public Trust. In Public trust or Trust of religious nature, the beneficiaries would be innumerable persons, who are not even known to the Trustees. I consider that the settler and Trustees together cannot enter into a contract on behalf of the beneficiaries. Any dispute between the beneficiaries can be referred to the arbitration only if there is an independent Arbitration agreement between the beneficiaries for referring the dispute to the arbitration.

9. It is settled law that in order to enter into a contract, the parties must be legally competent. A minor or a person of unsound mind cannot enter into an agreement, but under the Trust relied upon by the applicant, a minor as well as a person of unsound mind can become beneficiary. No Arbitration Agreement can become binding on them because they are not even competent to enter into the agreement. Moreover, an Arbitration Agreement is binding on the parties who by their own will and consent agree to refer the dispute to the Arbitrator. Two persons cannot bind their successive generations to a contract entered into between them. Similarly, a person may while making a Will and appointing somebody as Executor of the Will, provide for an arbitration clause that any dispute between the beneficiaries of the Will, will be decided by the Arbitrator. Such a clause would not be binding on the beneficiaries, because they were not party to the Arbitration Agreement although they may be getting benefits out of the Will. A person can dispose of his property by Will but a person cannot create a contract between two other persons by his Will. Similarly, settler and Trustees can create a Trust and specify who will be the beneficiaries under the Trust but they cannot create a binding contract between the beneficiaries in respect of

settlement of dispute and cannot say that all disputes between the beneficiaries shall be decided by arbitration. The arbitration clause relied upon by the applicant is Therefore not binding on the beneficiaries and this application is not maintainable and is hereby dismissed as such.

9. Perusal of Trust Deed dated 6th April 1983 executed by the Settlor and Trustees indicates that the said Trust was created by the Settlor for the benefit of six beneficiaries who were minor at that time. It is not in dispute that the applicants in the present proceedings and respondent Nos. 4 to 6 to 5 to the said Trust Deed were shown as beneficiaries under the said Trust Deed. It is also not in dispute that various benefits were availed of by the beneficiaries under the said Trust Deed and the said deed is acted upon. Under the said trust Deed, the Trustees were empowered to deal with the properties of the trust in a manner set out therein. Perusal of Clause-20, in my view, clearly indicates that if disputes, differences regarding the interpretation of any of the clauses or provisions or the contents of the said Trust Deed or between the Trustees, or the Trustees and beneficiaries, or the beneficiary inter-se regarding the rights, titles or interest flowing or arising from the said Trust Deed or consequential thereto or arising shall be resolved in accordance with the Arbitration Act. In my view, there is no substance in the submission made by the learned counsel appearing for respondents that the applicants, being minor at the time of execution of the Trust Deed, were not party to the arbitration agreement. In my view, the minors who were beneficiaries, could not have signed the said Trust Deed, as were not capable of executing the said document on their own. It is, however, clear that Trust was created by the Settlor for their benefit, which contains arbitration clause and which agreement is acted upon by the parties not only when applicants and respondent Nos. 4 to 6 were minor and even after they became major. In my view, the definition of "party" u/s 2(h) of the Act has to be interpreted harmoniously and the beneficiaries, who were referred in the said Trust Deed as beneficiaries which provides for referring all disputes to arbitration between the beneficiaries and Trustees and also beneficiaries inter-se, has to be construed as if the beneficiaries were also party to the arbitration agreement. It is not in dispute that the beneficiaries who are applicants in the present proceedings and respondent Nos. 4 to 6 are now major. In my view, beneficiaries under the said Trust Deed are not only claiming through the Trustees when they were minor, but are claiming independently under the Trust Deed after attaining the age of majority and are thus, entitled to agitate the dispute having arisen between the applicants beneficiaries and the Trustees as well as beneficiaries inter-se by invoking arbitration clause recorded in the Trust Deed.

10. In so far, Judgment of Delhi High Court relied upon the learned counsel for respondents is concerned, perusal of arbitration clause set out in paragraph 3 of the said Judgment and Clause-20 of the Trust Deed relied upon in this matter, indicates that these clauses are totally different. In this case, applicants beneficiaries who are entitled to apply for appointment of arbitrator are not disputing the existence of arbitration clause. The issue before the Delhi High

Court was whether arbitration clause entered into by the Settlor would be binding on the beneficiaries or not. In this application, as the applicants are not disputing the existence of arbitration agreement and the clause provides for resolution of dispute through arbitrator in case of dispute between beneficiaries and Trustees and beneficiaries inter-se, reliance placed by the respondents on the Judgment of Delhi High Court is of no assistance to the respondents.

11. Similarly, in view of the decision taken by me in earlier paragraphs of this order that the applicants beneficiaries were not only claiming through the Trustees, but are claiming independently as now applicants having become major are entitled to adopt the arbitration agreement entered into by the Settlor on their behalf on their attaining age of majority. In my view, Judgment relied upon by the respondents in case of Mohori Bibee (supra) is of no assistance to the respondents.

12. Perusal of reply given by the respondents to the notice of invoking arbitration by the applicants indicates that no such issue about existence of arbitration agreement has been raised in the said reply.

13. In my view, there is no merit in any of the submissions made by the respondents. In view of the existence of arbitration clause and in view of the respondents refusing to appoint an arbitrator, present application u/s 11 is maintainable and the arbitrator is required to be appointed.

14. Shri S.R. Shah, former Judge of Bombay City Civil Court, is appointed as sole arbitrator. Application is disposed of. No order as to costs. Mr. Kapadia, the learned counsel appearing for respondent Nos. 4 to 6 applies for stay of operation of this order. Operation of this order is stayed for a period of four weeks from today.