

(2013) 09 BOM CK 0172

In the Bombay High Court

Case No : Arbitration Application No. 178 of 2013

Mrs. Perin Hoshang Davierwalla and Another

APPELLANT

Vs

Mr. Kobad Dorabji Davierwalla and Others

RESPONDENT

Date of Decision : 04-09-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 10, 10(1), 10(2), 11, 11(2)
Partnership Act, 1932 — Section 69(1), 69(3), 69(3)(a)

Citation : (2013) 09 BOM CK 0172

Hon'ble Judges : Roshan Dalvi, J

Bench : Single Bench

Advocate : Dinyar Madon, assisted with Mr. Akshay Patil, Mr. Vishesh Malviya, Ms. Shweta Jaydev instructed by Federal Rashmikant, for the Appellant; A.V. Anturkar a/w. Ms. Kalyani Tulankar, Dormaan Dalal instructed by S. Deshmukh for Respondent No. 1, Mr. Gaurav Joshi a/w. Mr. Karzan Shroff, B.H. Antia, Mrs. S.K. Kapoor, H.N. Vakil, Sunil Chavan instructed by Mulla and Mulla and CBC, for the Respondent

Judgement

Roshan Dalvi, J.—This is an application u/s 11(6) of the Arbitration and Conciliation Act, 1996 (the Act). The parties are partners in the partnership business of running IL PALAZZO HOTEL. There are 5 partners in the partnership. The parties entered into a Partnership Deed on 06.03.1992. The partnership is at will but if a partner desires to retire, he/she would require to give 3 months notice in writing to the other partners. The applicants have sought to dissolve the partnership. They have given notice of dissolution. The partnership agreement contains an arbitration clause being clause No. 29 thereof, the relevant part of which runs thus:

All disputed and differences whatsoever which shall either during the partnership or after the termination thereof arise, between the partners or their representative or between any partner and the legal heirs/representatives of the other partner touching these presents or the construction or application thereof, or any clause or thing herein contained, or any account, division, valuation debts

or liabilities to be made hereunder or as to any other matter in or the rights, duties or liabilities of any persons under these presents shall be referred to arbitrators one to be appointed by each party to the difference in accordance with and subject to the provisions of the Indian Arbitration Act, 1940 ...

2. The applicants have claimed that they have sought arbitration with regard to the dissolution of the firm, its accounts and their share in the property.

3. The applicants have sought to appoint a sole arbitrator. The arbitration agreement clearly does not envisage or permit or allow a sole arbitrator. The agreement as cited above specifies arbitrators in the plural. These arbitrators are to be appointed, "one by each party to the difference". There have been differences and disputes between the parties. Those differences would have to be adjudicated in the arbitration. There would be minimum two parties to any difference or dispute. Hence the arbitration clause contemplates two or more arbitrators depending upon how many specific differences and disputes each party, who would be each partner, may have. It is, therefore, a multi-party agreement as rightly contended by Mr. Anturkar as also Mr. Joshi on behalf of two sets of respondents who claim to have separate sets of differences and disputes and which could be adjudicated only in the arbitration.

4. The applicants have jointly appointed one arbitrator. The respondents have separately appointed one arbitrator each upon being given a notice to refer the disputes and differences to arbitration and upon being called upon to appoint an arbitrator thereunder. It is in view of this that this application would have to be considered.

5. Mr. Madon on behalf of the applicants contended that Section 10. requires the parties to determine the number of arbitrators which would be even numbers and failing such determination there would be a sole arbitrator. The applicants have applied for appointment of a sole arbitrator on the premise that no number of arbitrators is mentioned in Clause 29 of the Partnership Deed which is the agreement relating to arbitration entered into by and between the parties. Indeed the clause does not have the specification of the number of arbitrators by cardinal Nos. 1, 2, 3 etc. Nevertheless the arbitration agreement specifically contemplates one arbitrator each to be appointed by the party to the difference. The number though not specified is specifiable. It would vary and depend upon the parties between the difference being the groups of the partners to the difference. It would generally contemplate two parties to the difference or the dispute. Partners having the same interest may not be a separate party to the difference. They would be entitled to go together and from one group of a party to the difference or the dispute. This is much as the applicants have done. The partners may have separate differences or disputes. They are entitled, under the unique arbitration agreement between them, to appoint a separate arbitrator upon being a party to a separate and distinct difference. It is argued by Mr. Joshi that "each party" in Clause 29 would mean each partner. That may or may not be correct. If each partner has a separate and distinct difference or dispute he

would have the entitlement to have a separate arbitrator but a group of partners would be entitled to come together in their contention with regard to the difference or dispute between the parties and in which case they would be entitled to appoint but one arbitrator amongst themselves. Hence upon a dispute having arisen there would be generally two parties to such difference, some other partners joining or citing one of those parties. Whatever that be the arbitration agreement contemplates at least two arbitrators so soon as there is a difference or dispute between the parties which is sought to be referred to arbitration and hence the expression "arbitrators" in the clause.

6. u/s 10(1) the parties are free to determine the number of arbitrators provided that the number of arbitrators shall not be even number. In this case they have determined their arbitrators. Even if there are only two parties to the difference or dispute and the number of arbitrators may be two, which is an even number, it would have to be seen whether the arbitration agreement between the parties could be enforced as agreed by them.

7. u/s 11(2) the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

8. The parties have as per that freedom agreed upon the aforesaid unusual procedure under which each party to the difference gets a right of appointment of one arbitrator. It may result in even number of arbitrators being appointed. It would have to be seen whether the freedom of the parties to agree on a procedure can be curtailed by the proviso in Section 10(1) of the Act. If the freedom cannot be curtailed by the proviso the parties' choice must be allowed to prevail. If the curtailment u/s 10(1) would impeach upon the freedom granted u/s 11(2) the determination between the parties must be taken to have failed. Upon such failure the provision u/s 10(2) would apply and then the Arbitral Tribunal would consist of a sole arbitrator.

9. This aspect has been covered by the judgment in the case of Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Others, . In that case the parties agreed to refer their disputes and differences to the arbitration of two arbitrators who acted as such and gave the arbitral award which came to be challenged inter alia on the ground that appointment of even number of arbitrators is specifically prohibited u/s 10(1) of the Act. Upon considering that the arbitration proceeded without any challenge to the competence of any Arbitral Tribunal u/s 16 of the Act, that contention would be taken to be waived u/s 4 of the Act. Hence though it was argued that Section 10 was mandatory and could not be derogated and which despite the mandate in that arbitration agreement was specifically derogated, it was held that Section 10 was derogable. This is what the Supreme Court has had to say upon the specific non compliance of Section 10 which is rather plain and clear:

Similarly, even if parties provide for appointment of only two arbitrators, that does not mean that the agreement becomes invalid. u/s 11(3) the two

arbitrators should then appoint a third arbitrator who shall act as the presiding arbitrator. Such an appointment should preferably be made at the beginning. However, we see no reason, why the two arbitrators cannot appoint a third arbitrator at a later stage i.e. if and when they differ. This would ensure that on a difference of opinion the arbitration proceedings are not frustrated. But if the two arbitrators agree and give a common award there is no frustration of the proceedings. In such a case their common opinion would have prevailed, even if the third arbitrator, presuming there was one, had differed.

This would be much like a Division Bench of a Court in case of adjudication of disputes judicially.

10. Consequently if in this case there are two parties to the disputes having two groups of partners, which could be well contemplated between the parties unless a specific separate case is made out by more than two partners, the parties may preferably in the beginning of the arbitration appoint one more arbitrator. However they may even proceed with two arbitrators until such time that the need for the third arbitrator is felt which would only be if the two arbitrators differed. Similarly, since all the respondents have sought to appoint one arbitrator each, an assuming that that act does not lack bonafides, the parties may have 4 arbitrators between themselves having 4 separate differences or disputes, in which case they might require to appoint a 5th arbitrator who shall be the presiding arbitrator. This however could also be appointed only if required and i.e. if the 4 arbitrators split in their award equally.

11. Consequently, it has been held, as it should be, given the spirit of the legislation to resolve disputes by arbitration in a free manner, that even appointment of two arbitrators or a situation in which two or any other even number of arbitrators come to be appointed would not be against public policy. The contention that if two parties agreed to go to arbitration by appointing two arbitrators the award would be against public policy was, therefore, rubbished in the case of Narayan Prasad Lohia (supra) upon the observation of the Supreme Court thus:

On the contrary there would be waste of time, money and energy if such a party is allowed to resile because the award is not to its liking. Allowing such a party to resile would not be in furtherance of any public policy and would be most inequitable.

12. Consequently the parties to the arbitration agreement who must honour, respect, apply and follow the agreement entered into by them for any dispute or difference between them must appoint the number of arbitrators envisaged by them as stated in Clause 29 of the agreement. It can, therefore, not be said that the arbitration clause has failed to determine the number of arbitrators or that it is vague in that behalf or that the parties have not determined the precise number arbitrators to whom the dispute or difference can be referred and, therefore, there must be sole arbitrator.

13. The applicants have called upon the respondents to appoint any one arbitrator as the sole arbitrator. This is wholly contrary to their agreement to arbitrate with regard to the number of arbitrators determined by them to whom their dispute or difference could be referred. The applicants having called upon the respondents to appoint a sole arbitrator, they have appointed one arbitrator each. They contend that they are a separate party to the difference. In fact, they contend that each partner to the dispute is a separate party to the difference or the dispute.

14. They having appointed their arbitrator, it would have to be seen whether the Court would have any jurisdiction to appoint any arbitrator as the sole arbitrator as claimed by the applicants. This jurisdiction can be exercised and this application is made u/s 11(6)(a) of the Act under which when a party fails to act as required under the procedure for appointing arbitrators set out in Section 11(2) of the Act that the Chief Justice or any other Judge designated by him could appoint such arbitrator. It is seen that the procedure for appointing arbitrators which the parties were free to agree upon has been followed by the respondents claiming to be a separate party to the difference or the dispute. Hence they cannot be taken to have failed to act as required by the procedure under Clause 29 of the Partnership Deed and hence the jurisdiction of the Court u/s 11(b)(a) cannot be invoked by the applicants.

15. It is contended on behalf of the applicants that each party appointing an arbitrator would result in a number of arbitrators since there are 5 partners. In fact, it would result in 4 arbitrators since two applicants have appointed but one arbitrator between themselves resulting in an even number and requiring, perhaps later, the appointment of 5th arbitrator as a presiding arbitrator. It is argued on behalf of the plaintiff that this would result in needless costs which the applicants also would require to bear and a clause which requires each party to the difference to appoint a separate arbitrator need not be enforced. The bonafides or otherwise of the appointment by each of the respondents as each partner who is a separate party to the difference in Clause 29 as interpreted by them can only be tested in the arbitration. It cannot be suspected at present. The clause would require to be complied by all the parties since that is the contract or an agreement between them. The agreement cannot be re-written by the Court. Mr. Anturkar rightly argued that that would make a novation which the Court cannot do. There is no procedure de hors such a clause as agreed upon between the parties u/s 11(2) of the Act which the Court can lay down, make or enforce u/s 11(6)(a) of the Act.

16. Hence the application must fail.

17. The respondents have taken a further contention that the application cannot even be maintained u/s 11 of the Act as the partnership is unregistered. It is contended on behalf of the applicants that the dispute and difference between the parties is upon the notice to dissolve the partnership at will and hence the application, for dissolution of accounts and for the share in the property of the

partners and consequently registration of the firm is not required u/s 69(3)(a) of the Partnership Act, 1932. It is argued on behalf of the respondents that in view of clause allowing retirement of a partner, the partnership would not be at will, despite clause 6 of the Partnership Deed between the parties and that consequently the dissolution by the notice given by the applicants to dissolve the firm is disputed and hence the applicants' claim to arbitration would be a proceeding to enforce a right arising from the contract, being the partnership agreement, but not the right to dissolve the partnership and hence would fall u/s 69(3) of the Act requiring mandatory registration u/s 69(1) of the Act for failure of which the arbitration, much as the suit, cannot be maintained. Counsel on behalf of all the parties have relied upon and interpreted a number of judgments with regard to the niceties, intricacies of Section 69(3) or its exception u/s 69(3) (a) of the Partnership Act but which, in view of the fact that the application cannot be maintained u/s 11(6) of the Arbitration Act need not be considered and hence is not considered. In the result the application is rejected.