

(2005) 08 DEL CK 0056

In the Delhi High Court

Case No : Writ Petition (Civil) No. 5947 of 2003

Pawan Kumar Jain

APPELLANT

Vs

Parduman Jain and Others

RESPONDENT

Date of Decision : 25-08-2005

Acts Referred:

Arbitration Act, 1940 — Section 24, 34
Arbitration and Conciliation Act, 1996 — Section 5, 7(1), 8, 9
Civil Procedure Code, 1908 (CPC) — Section 89
Constitution of India, 1950 — Article 226, 227
Partnership Act, 1932 — Section 6

Citation : (2005) 08 DEL CK 0056

Hon'ble Judges : Gita Mittal, J

Bench : Single Bench

Advocate : Pradeep Dewan and Rajiv Samaiyar, for the Appellant; M.L. Srivastava and Mukesh Kumar for Respondent Nos. 1 and 2, for the Respondent

Final Decision : Allowed

Judgement

Gita Mittal, J.—This writ petition has been filed by the petitioner under Articles 226 & 227 of the Constitution of India aggrieved by an order dated 30th July, 2003 whereby the learned Arbitral Tribunal was pleased to direct his impleadment as a party to the arbitration proceedings even though he was not a party to the arbitration agreement.

2. The facts giving rise to the present petition are within a narrow compass. To the extent that the same are not disputed and are necessary, the same are set out hereunder.

3. Shri Sandeep Jain (respondent No. 2 herein), Shri Parduman Jain (respondent No. 1 herein), Ms. Ritika Jain (respondent No. 3 herein) and Mr. S.K. Jain & Sons HUF (respondent No. 4 herein) entered into a partnership dated 2nd April, 2001. These parties had agreed to carry on business in partnership under the name and style of M/s Vardhman Computer Embroidery which was to engage in the

business of embroidery on job basis and to render consultancy services. The partners were at liberty, however, to undertake any other line(s) of business in addition to or in substitution of this present business. The partnership was stated to be effective from 2nd April, 2001 and would continue till it was dissolved in a manner mutually decided by the partners. Clause 5 of the partnership deed provided that the business shall be managed by the partners themselves or by any of them or their authorised agents peacefully and diligently to the best interest of the firm and in accordance with the policy and decision taken by the partners from time to time.

4. Clause 12 of the partnership deed relevant for the purposes of adjudicating the issues raised in the present writ petition reads as under:

12. Arbitration

That all the disputes relating to this partnership business between the partners or their representatives, if cannot be settled mutually, the same shall be referred to arbitration and entire proceedings thereof shall be governed as per provisions of the Arbitration Act.

5. It appears that certain disputes arose between the respondent Nos. 1 & 2 on the one side and respondent No. 3 on the other. These disputes related to removal of books of accounts and documents as well as withdrawal of amount from the accounts of the partnership firm. According to the petitioner, business was being exclusively looked after by respondent Nos. 1 & 2. The respondent No. 3 (daughter of the petitioner) is stated to be a student who was pursuing a regular course of study as a day scholar in a college while respondent No. 4 is stated to be an HUF firm and its Karta was a busy Chartered Accountant who, due to paucity of time, could not devote his time to the affairs of the partnership firm.

6. The respondent No. 3 is stated to have made a demand upon the respondent Nos. 1 & 2 to render the accounts of partnership firm with the intention of protecting the books of accounts, vouchers bill books etc. which were lying in the custody of respondent Nos. 1 & 2 and in order to save them from destruction.

7. Respondent No. 3 is stated to have filed a petition on the original side of this Court u/s 9 of the Arbitration and Conciliation Act on 4th September, 2002. This petition was registered as OMP No. 283/2002 and was entitled Ritika Jain v. Shri Parduman Jain and Ors. By way of this petition, the respondent No. 3 prayed for appointment of a receiver to preserve the books of accounts and records of the firm and for grant of an ad-interim injunction. It has been stated that an advocate was appointed as a receiver to take into custody the records of the firm from the possession of the respondent Nos. 1 & 2 vide an order dated 6th September, 2002 in these proceedings.

8. Subsequently, vide an order made on 12th December, 2002 in the OMP No. 283/2002, the court was pleased to appoint Shri K.P. Verma, District Judge

(Retired) as a sole arbitrator to resolve the matter. Both parties to the petition were directed to remain present before the sole arbitrator on 21st December, 2002. It is stated that pursuant to the order dated 12th December, 2002, the sole arbitrator who has been arrayed as respondent No. 5 before this court, entered upon the reference. The respondent Nos. 3 & 4 filed their claims against the respondent Nos. 1 & 2 before the learned sole arbitrator, respondent No. 5. The respondent Nos. 1 & 2 also filed their reply thereto and also raised a counter claim against respondent Nos. 3 & 4.

9. While the matter was pending before the Sole Arbitrator, the respondent Nos. 1 & 2 filed an application dated 8th March, 2003 praying for impleadment of the present petitioner in the arbitration proceedings. The application was made on the averment that the petitioner Mr. Pawan Kumar Jain, Mr. S.K. Jain (respondent No. 4 herein) and Ms. Ritika Jain (respondent No. 3 herein) had entered into a criminal conspiracy and fraudulently obtained large sums of money from respondent Nos. 1 & 2 through cheques and cash memos in M/s Urvee Creation by way of loan. In this behalf, these respondents referred to a report dated 26th July, 2002 addressed to the SHO, Police Station Seelampur, Delhi by Mr. Pawan Kumar Jain. Further allegations were made to the effect that the present petitioner was managing and procuring the material and work for the concern being the principal beneficiary thereof and also for his daughter, the respondent No. 3 herein. It was alleged that the petitioner, being the main person in the entire episode and in the run of the business, was an essential party and without his presence, the arbitration proceedings cannot be properly adjudicated upon. An allegation was made that the partners were merely "de jure" partners while the petitioner was a "de facto" partner.

10. The respondent No. 3 filed a reply vehemently disputing all averments made in the application. It was stated that the petitioner was not a party to the arbitration agreement or proceedings and that in case the respondent Nos. 1 & 2, who had filed the application, had any claim against the present petitioner, they would have to take recourse to such proceedings as are available in accordance with law. It was also pointed out that the proceedings before the arbitrator related to dissolution of the partnership and rendition of accounts by respondents Nos. 1 & 2 and that the petitioner was never a partner in the partnership firm Vardhman Computer Embroidery in respect of which arbitration proceedings were going on.

11. The learned Arbitrator passed an order dated 30th July, 2002 allowing the application and directed that the present petitioner should be impleaded as a claimant on the ground that his interest appears to be similar to the other claimants and at variance with the interest of respondent Nos. 1 & 2. This order has been impugned by way of the present writ petition by the petitioner on the plea that the petitioner was not a party to the arbitration agreement or the subject matter of claims. It has been further submitted that the disputes between the petitioner on the one hand and respondent Nos. 1 & 2 on the other

were matters which were wholly beyond the arbitration agreement and were beyond the purview of the arbitration proceedings. It has further been argued that the order of the learned Arbitrator has been passed on sheer conjectures and surmises and the learned arbitrator appears to have been influenced only by the fact that the petitioner was the father of the respondent No. 3.

12. The respondent Nos. 1 & 2 have supported the order dated 30th July, 2003 passed by the learned arbitrator on the same grounds as were urged before the learned arbitrator submitting that the petitioner is the father of the respondent No. 3 and brother-in-law of the Karta of respondent No. 4 and further that it was the petitioner who was looking after the accounts and business on behalf of the respondent No. 3. According to these respondents, it was the petitioner who was more or less acting as representative of his daughter and brother-in-law who were alleged to be sleeping partners in the business. Reliance has also been placed by the respondent No. 1 & 2 on the role played by the petitioner in proceedings before the police as well as his actions on behalf of the respondent Nos. 3 & 4 and in the creation and closure of the partnership business.

13. I have given my considered thought to the issues raised and submissions made by the parties. Before addressing the other issues, I may refer to the provisions of the Indian Partnership Act, 1932 relied upon by the respondent Nos. 1 & 2 in support of their plea that the petitioner could have been impleaded as a party. Reliance has been placed on Section 6 of the enactment which reads as under:

6. Mode of determining existence of partnership In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together.

Explanation 1.- The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners.

Explanation 2.- The receipt by a person of a share of the profits of a business, or of a payment contingent upon the earning of profits or varying with the profits earned by a business, does not of itself make him a partner with the persons carrying on the business:

(a) by a lender of money to persons engaged or about to engage in any business,

(b) by a servant or agent as remuneration.

(c) by the widow or child of a deceased partner, as annuity, or

(d) by a previous owner or part owner of the business, as consideration for the sale of the goodwill or share thereof, does not of itself make the receiver a partner with the persons carrying on the business.

14. Based on this statutory provision, it has been urged that the legislature

intended that persons who have conducted themselves in such manner as the petitioner are to be treated as partners in a partnership firm.

15. I have carefully perused the replies filed by the respondents No. 1 & 2 before the arbitrator and this court. Other than averments to the effect that the petitioner was interfering in the business or that amounts were withdrawn or deposited by him and also he was a party to the police complaint, there is no averment that the petitioner was a representative of any of the parties to the partnership. There is also no allegation to the effect that the petitioner was authorised by any legal document whereby he was appointed as an agent or representative of a party to the partnership deed to act for or on their behalf. The application for impleadment was based on the sole assertion that two of the partners, that is, respondent Nos. 3 & 4 were acting in collusion with the petitioner and they had a conspiracy amongst each other prior to even commencement of the partnership business. For this purpose, reliance was placed on the relationship between the petitioner and respondent Nos. 3 & 4 in support of the submission that the petitioner was a de facto partner and his presence was necessary for the complete and effective adjudication of the disputes.

Perusal of Section 6 of the Indian Partnership Act, 1932 would show that the same is of no assistance to respondent Nos. 1 & 2. In the instant case, there is a written partnership deed which would govern the issue as to who were persons who constituted the partnership firm. A bald assertion to the effect that the respondent Nos. 3 & 4 had hatched the conspiracy with the petitioner, would not lead to a conclusion that the petitioner was a partner in the partnership firm. In any case, the stand taken in the application for impleadment would appear unjustified in as much as the said respondents have themselves taken recourse to filing civil litigation against the petitioner.

16. In this behalf, the court is concerned not only with an agreement to function as a partner but also with the consent and agreement to refer disputes inter se such partners to arbitration. Therefore, while a set of persons may get together and enter into a partnership deed, but the partnership deed may still not have a arbitration clause or the parties may not have agreed to refer disputes to arbitration.

17. In the instant case, Clause 12 of the partnership deed contained the arbitration clause wherein disputes relating to the partnership business between parties or their representatives were referable to arbitration.

18. My attention has been drawn to the provisions of Section 7(1) of the Arbitration & Conciliation Act, 1996 by the respondents Nos. 1 & 2. Perusal thereof shows that an arbitration agreement is in writing if it is contained in a document signed by the parties.

19. It is abundantly clear that the partnership deed was not signed by the petitioner. The arbitration clause and agreement was contained in Clause 12 of

the partnership deed. Therefore, admittedly, the petitioner is not a party to any arbitration agreement.

20. It has also been pointed out that the respondent Nos. 1 & 2 have filed two civil suits for recovery against the petitioner. I find force in the submission made on behalf of the petitioner that if the petitioner was a party to the arbitration agreement, then there would have been no necessity for filing the suit against him by the respondent Nos. 1 & 2.

21. I also find that the learned Arbitrator has been persuaded to allow the application and direct impleadment of the petitioner as a claimant on the submissions of the respondent Nos. 1 & 2 to the effect that the possibility cannot be ruled out that Shri Pawan Kumar Jain might have played some significant role in the running of the business and that it may ultimately be found that Shri Pawan Kumar Jain misappropriated the funds of Vardhman Computer Embroidery and withheld its records even though he was officially not a partner or employee of that firm.

22. In the event of it being so found and held, it is apparent that the partnership and or its partners would have to take recourse to an appropriate remedy available in accordance with law for recovery of such amount as are due and payable by the petitioner.

23. The petitioner has placed reliance on the judgment reported at 2001 (1) Arb.LR 430 entitled Subhash Chug & Co. v. Girnar Limited to contend that the provisions of Section 5 of the Arbitration and Conciliation Act, 1996 cannot and should not supersede or override the constitutional power of High Court given under Articles 226 & 227 of the Constitution of India. The powers are supervisory but wide and that no remedy having been provided under the Arbitration & Conciliation Act, the same would be subject to control by constitutional provisions. This pronouncement has been cited in support of maintainability of the writ petition.

24. In the pronouncement of the Apex Court reported at Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, ., the court was concerned with the matter arising out of suit for declaration relevant portion thereof reads as under:

A suit for dissolution of the partnership firm and accounts and inter alia challenging the conveyance deed executed by the partnership firm in favour of one W was filed by Respondent 1. On the same day, an arbitration petition u/s 8 of the Arbitration and Conciliation Act, 1996, was filed by the appellant, another partner in the firm. The High Court rejected the petition taking the view that in the suit apart from the relief of dissolution and accounts, the plaintiff has prayed for other reliefs. All the defendants to the suit are not parties or partners in the partnership firm and the terms of the partnership deed including the arbitration clause are not binding on them. Only part of the subject matter could at the most be referred to arbitration. Further, there is no power conferred on the court to add parties who are not parties to the agreement in the arbitration

proceedings. The Court also negated the alternative prayer for referring part of the subject-matter in respect of those parties who are parties to the partnership agreement which contains arbitral clause on the ground that such procedure is not contemplated under the Act.

Section 89 CPC cannot be resorted to for interpreting Section 8 of the Act as it stands on a different footing and it would be applicable even in cases where there is no arbitration agreement for referring the dispute for arbitration. Further, for that purpose, the court has to apply its mind to the condition contemplated u/s 89 CPC and even if application u/s 8 of the Act is rejected, the court is required to follow the procedure prescribed under the said section.

Lastly, considering the language used in Section 8, it is not necessary to refer to the decisions rendered by various High Courts interpreting Section 34 of the Indian Arbitration Act, 1940 which gave a discretion to the court to stay the proceedings in a case where the dispute is required to be referred for arbitration.

xxx xxx xxx 8. Power to refer parties to arbitration where there is an arbitration agreement(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in Sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under Sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

13. Secondly, there is no provision in the Act that when the subject-matter of the suit includes subject-matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject-matter of the suit to the arbitrators.

14. Thirdly, there is no provision as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement. As against this, u/s 24 of the Arbitration Act, 1940, some of the parties to a suit could apply that the matters in difference between them be referred to arbitration and the court may refer the same to arbitration provided that the same can be separated from the rest of the subject-matter of the suit. The section also provided that the suit would continue so far as it related to parties who have not joined in such application.

15. The relevant language used in Section 8 is: "in a matter which is the subject of an arbitration agreement", the court is required to refer the parties to arbitration. Therefore, the suit should be in respect of "a matter" which the

parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The words "A matter" indicate that the entire subject-matter of the suit should be subject to arbitration agreement.

16. The next question which requires consideration is-even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible u/s 8 of the Act. In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action, that is to say, the subject-matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject-matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows the bifurcation of the subject-matter of an action brought before a judicial authority is not allowed.

25. In these facts, the Apex Court referred to Section 8 of the Arbitration & Conciliation Act, 1996 which reads as under:

8. Power to refer parties to arbitration where there is an arbitration agreement(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in Sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under Sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

26. Applying the statutory provision to the aforesaid facts, the court held as under:

13. Secondly, there is no provision in the Act that when the subject-matter of the suit includes subject-matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject-matter of the suit to the arbitrators.

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27. Accordingly, the Apex Court dismissed the appeal filed before it.

28. I am bound by this authoritative judicial pronouncements which are to the effect that a person who is not a party to the arbitration agreement cannot be made party to the arbitration proceedings before the Arbitral Tribunal. Admittedly, the petitioner was not a party to the Arbitration Agreement and has not signed the agreement between the parties. In the instant case, there is no material in support of the assertion that the petitioner was acting as a representative of the respondent No. 3 in the matter. In any case, there is no evidence in support of such appointment by either of respondent No. 3 or respondent No. 4.

29. The disputes between the respondent Nos. 1 & 2 on the one hand and petitioner on the other are not disputes arising under Clause 12 of the Partnership Deed dated 2nd April, 2001 and, as such, cannot be the subject matter of arbitration before the Arbitral Tribunal. In the event of the respondent Nos. 1 & 2 having any claim against the petitioner, recourse has to be taken to appropriate remedy in accordance with law. The pending arbitral proceedings between the respondents No. 1 to 4 are not an appropriate forum for adjudication of disputes between the petitioner and respondent Nos. 1 & 2. The same are beyond the terms of the arbitration clause and agreement between the parties. In any case, the respondent Nos. 1 & 2 are stated to have taken recourse to civil suits in respect of their claim and the parties have to be diverted to such remedy.

30. I may also notice that the learned arbitrator in his order dated 30th July, 2003 has noticed that the claimant had undertaken to produce the petitioner Shri Pawan Kumar Jain as a witness. Respondent Nos. 1 & 2 were seeking impleadment of the petitioner only for the reason that he had been actively interfering with and had entered into a conspiracy before commencement of the

partnership. The petitioner as a witness can be cross-examined on all these aspects in the arbitration proceedings, if and when the petitioner is required to give evidence.

31. In view of the afore-stated position in the facts of the case and the judicial pronouncements, the order dated 30th July, 2003 is contrary to the law laid down by the Apex Court and statutory provisions and cannot be permitted to stand.

32. I, accordingly, hereby set aside and quash the order dated 30th July, 2003 and direct that the respondent No. 5 shall proceed in the matter in accordance with the procedure prescribed by law.

The writ petition is allowed.

Parties are left to bear their own cost.