

(2011) 05 CAL CK 0062

In the Calcutta High Court

Case No : GA No. 3582 of 2010 and CS No. 195 of 2010

Rajeev Maheshwari and Others

APPELLANT

Vs

Indu Kocher and Others

RESPONDENT

Date of Decision : 06-05-2011

Acts Referred:

Arbitration Act, 1940 — Section 34

Arbitration and Conciliation Act, 1996 — Section 11, 16, 20, 8, 8(2)

Limitation Act, 1963 — Section 27

Partnership Act, 1932 — Section 46

Citation : (2011) 3 CHN 680

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : Hirak Kumar Mitra, Sandwip Mukherjee, Pooja Das Chowdhury and G.S. Asopa, for the Appellant; Anindya Mitra Debangshu Basak, Anumoy Basu and Diptangshu Basu for Respondent No. 1 to 3 and Utpal Bose and S.N. Singh, for the Respondent

Judgement

Sanjib Banerjee, J.—The application is by the first three Defendants u/s 8 of the Arbitration and Conciliation Act, 1996 seeking reference of the disputes to arbitration in terms of an arbitration agreement contained in a deed of partnership. The reliefs claimed in the suit include a declaration that the Defendants do not have any right, title or interest in respect of the dissolved partnership firm by the name of Bharat Industries and Commercial Corporation including the assets specified in paragraph 10 of the plaint and the consequential injunction relating to such properties. The Plaintiffs are the sons of one Mohanlal Maheshwari who, along with Mohanlal Kocher, the predecessor-in-interest of the Defendants other than the Defendant No. 5, commenced a partnership business under a deed of December 23, 1972. Senior Maheshwari died in December, 1984 and senior Kocher died in March, 1992. The fifth Defendant is described in the plaint as the assignee of a purported agreement for sale of senior Kocher's interest in the firm.

2. The plaint claims that disputes and differences arose between the two partners of the firm which were referred to two arbitrators in August, 1984 and the arbitrators appointed an umpire. According to the plaint, by reason of the death of partner Maheshwari, the firm stood dissolved and no effective steps were taken in the arbitral reference. The Plaintiffs claim that on the expiry of three years from the date of such dissolution of the firm, "the claim of the Defendants for accounts and a share of the profits of the dissolved partnership firm, if any, arising out of or concerning the erstwhile partnership business came to an end and became barred by limitation." The plaint proceeds to record that in 1985 the first Plaintiff and the third Defendant made "some in fructuous attempts" to wind up the partnership business but nothing came out of the Endeavour though an agreement was entered into on February 4, 1985. However, this subsequent agreement appears to have been executed by the then heirs of senior Maheshwari and Mohanlal Kocher. The Plaintiffs suggest that on December 26, 1990 senior Kocher assigned his share in the assets and liabilities of the firm in favour of one Om Prakash and such Om Prakash has apparently transferred such beneficial interest by a deed of transfer of May, 1991 in favour of the fifth Defendant. Paragraph 8 of the plaint records that the fifth Defendant, Kishan Mimani, has filed a suit in this Court for specific performance of "the said agreement for sale." In the same breath the Plaintiffs contend that the agreement relied upon by Mimani is "wrongful and void." The plaint narrates that in 1995, about three years after senior Kocher's death, his heirs applied in this Court u/s 20 of the Arbitration Act which was allowed in September, 2007 by directing filing of the arbitration agreement. That arbitration agreement is the same which has been cited by the applying Defendants in support of the present application. The Plaintiffs herein have preferred an appeal against the order made in the Section 20 proceedings and the operation thereof has been stayed though the appeal remains pending. At paragraph 10 of the plaint certain immovable properties have been referred to which the Plaintiffs claim to be exclusively under their possession. The claim is founded on Section 27 of the Limitation Act, 1963 on the Plaintiffs' assertion that since the period prescribed by the Limitation Act for seeking possession of any of the properties has expired, the Defendants' right to such property has been extinguished.

3. The applying Defendants say that the substance of the action is covered by the arbitration agreement contained in the partnership deed of 1972 and the institution and continuation of the suit would be in derogation thereof. The arbitration agreement that was contained in the partnership deed of 1985 provides,

13. That if any dispute or difference arises between the partners or between any one of them and the legal representatives of the other or others or between their respective legal representatives in connection with the business of the partnership or regarding the construction of the partnership deed during or after the partnership it shall be referred to the arbitration of two Arbitrators one to be appointed by each partners whose decision shall be conclusive and binding on all

parties and such arbitration shall be under the Indian Arbitration Act 1940 and any statutory modification thereof in force for the time being.

4. The applying Defendants say that the presence of the fifth Defendant in the array of parties is irrelevant since the claim is that the firm stood dissolved at the death of senior Kocher and, upon the expiry of a period of three years there from, the Kocher's' rights therein have stood extinguished. They contend that since the existence of the partnership deed is not in dispute and has been accepted in the plaint and in the subsequent agreement of 1985 that has also been referred to in the plaint, there is no impediment to the disputes being referred to arbitration in accordance with the arbitration agreement. They point out that the two principal reliefs are not distinct and stem from the same cause of action. The relief of injunction, the applying Defendants assert, is only consequential to the principal relief of declaration and the plaint does not carve out any separate basis therefore. The applying Defendants say that the fifth Defendant is a mere extension, in the legal sense, of the other Defendants as, if senior Kocher had no right in 1990 to assign his interest in the firm, the fifth Defendant would get no rights in respect thereof. They submit that there is no allegation that the fifth Defendant is in possession of any of the assets of the firm or that there has been any transfer of title relating to the assets of the firm in favour of the fifth Defendant.

5. Several grounds of defence have been adopted by the Plaintiffs. To begin with, they say that the arbitration agreement itself is of restricted application. They suggest - though the submission in such regard is at variance with the pleadings - that the 1985 agreement superseded the arbitration clause contained in the partnership deed of 1972. They indicate that the application is not maintainable since neither the original agreement nor a duly certified copy thereof has been appended thereto. They also cite their independent cause of action against the fifth Defendant, who is not a party to the arbitration agreement, as the final plank to resist the effective scuttling of the present action.

6. In support of the contention that the arbitration clause is restricted in its operation, the Plaintiffs say that only disputes or differences in connection with the business of the firm or disputes or differences regarding the construction of the deed would be amenable to arbitration. They insist that the "or" between the expressions "in connection with the business of the partnership" and "regarding the construction of the partnership deed" is disjunctive; such that disputes arising out of any third situation would not be covered by the clause. It is the Plaintiffs' submission that the word "business" in the relevant phrase would imply the continuing operations of the firm and matters pertaining to the conduct thereof. They say that since the business of the firm came to an end upon the death of their predecessor-in-interest, the entitlement of the partners or their heirs after the business of the firm came to an end cannot be covered by the limited arbitration agreement.

7. The argument on such count does not appeal. The arbitration agreement, in

its essential part, covers any dispute or difference between the partners or between any one of them (ideally, it should have been "either" instead of "any one") and the legal representatives of the other or between the legal representatives of the two partners "in connection with the business of the partnership or regarding the construction of the partnership deed during or after the partnership ..." There is no special indication that the expression "during or after the partnership" should operate only in the circumstance captured by the expression "regarding the construction of the partnership deed" and not in the situation covered by the phrase "in connection of the business of the partnership." There is also no indication that the word "business" should be read to imply only continuing commercial operations and not otherwise. In partnership law, the business of a firm does not cease upon its dissolution or upon the termination of its commercial operations. Section 46 of the Partnership Act, 1932, for instance, provides for the right of partners to have the business of the firm wound up after dissolution. The word "business" in the arbitration agreement has to be understood in its ordinary sense and would include the entire set-up of the firm, its commercial operations and its assets. Neither the partnership deed nor the arbitration clause permits the word "business" to be read in the constricted sense that the Plaintiffs impute.

8. The second contention of the Plaintiffs can be disregarded since it is not a case made out on pleadings. In any event, clauses 2, 3 and 4 of the subsequent agreement of February 4, 1985 expressly stipulate that the subsequent agreement was a "supplement to the agreement of arbitration" contained in the partnership deed. The subsequent agreement is incapable of being seen as having superseded the original arbitration agreement. The third clause of the subsequent agreement gave the arbitral tribunal further authority in matters relating to the winding-up of the firm.

9. As to the technical ground urged by the Plaintiffs that in the absence of the present application being accompanied by the original arbitration agreement or a duly certified copy thereof it is incompetent, it only needs to be said that notwithstanding Section 8(2) of the 1996 Act, the mandatory requirement would have to be met if there is a dispute as to the existence of the arbitration agreement. The plaint relating to the present suit admits the partnership deed of 1972 and refers to the arbitration agreement therein.

10. That the fifth Defendant is party to this suit but is not a party to the arbitration agreement is of little consequence in the light of the cause of action against such Defendant. The essence of the Plaintiffs' claim is that senior Kocher had no right as in 1990 qua the partnership firm or its assets and, consequently, could not pass on his non-existent rights to any other. The plaint case is not that even if senior Kocher had a valid right in the firm and its assets, he did not or could not have transferred the same to any other. That is not to suggest that if such assertion had been made in the plaint the present application would certainly have failed. The right canvassed by the Plaintiffs is that the firm stood

dissolved upon the death of their predecessor-in-interest and in the surviving partner not having sought his share of the assets or funds or even sought accounts within the time permitted, the rights that he once had could never be enforced and, as such, such rights were effectively extinguished. It is not necessary to comment on the case run by the Plaintiffs as that would encroach on the arbitrators' domain since the entirety of the present action appears to be covered by the arbitration agreement.

11. The parties have referred to several judgments. The decisions reported at National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., ; Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, ; Rashtriya Ispat Nigam Limited and Another Vs. Verma Transport Company, Everest Holding Ltd. v. Shyam Kumar Shrivastava; (1964) 1 W.L.R. 633 Taunton-Collins v. Cromie; Atul Singh and Others Vs. Sunil Kumar Singh and Others, N. Radhakrishnan Vs. Maestro Engineers and Others, ; Indowind Energy Ltd. Vs. Wescare (I) Ltd. and Another, have been cited.

12. Taunton-Collins has been placed by the Plaintiffs for the proposition that if separate proceedings have the possibility of throwing up conflicting results, it would be undesirable to permit adjudication before two fora. The Plaintiff in that case engaged an architect and a building contractor for the construction of a house. Upon the Plaintiff finding the work unsatisfactory, he issued a writ against the architect claiming damages. He later joined the building contractor as a party to the action whereupon the contractor applied for stay of the proceedings on the strength of an arbitration agreement between the contractor and the Plaintiff. The plea was refused in view of the undesirability of separate proceedings where there might be inconsistent findings. But the dictum rested on the exercise of discretion in rejecting the prayer for stay of the action. There is no discretion available to a judicial authority u/s 8 of the 1996 Act which is applicable here.

13. In Boghara Polyfab, in the context of the Section 11 of the 1996 Act, the Court considered the question whether a dispute raised by an insured, after giving a full and final discharge voucher to the insurer, could be referred to arbitration. The Supreme Court enumerated the issues that the Chief Justice or his designate would have to decide on an application u/s 11 of the Act, certain other issues that the Chief Justice or his designate may choose to decide or leave them to the decision of the arbitral tribunal and a third set of issues which the Chief Justice or his designate should leave exclusively to the arbitral tribunal to assess. The majority opinion of the Constitution Bench in SBP & Co. and a more recent opinion in Indowind Energy have been referred to in the context of the Boghara judgment.

14. There is a distinction between the role of the Chief Justice or his designate u/s 11 of the 1996 Act and the role of a judicial authority receiving an application u/s 8 of the Act. Once the dissimilarity is recognised, it may be better appreciated that the reliance on judicial pronouncements on Section 11 of the 1996 Act may not necessarily be of telling impact in a Section 8 scenario. u/s 11 of the 1996

Act, the party applying first asserts the existence of an arbitration agreement. But the mere assertion of such agreement would not entitle a party to apply there under if there is an agreed procedure for appointing the arbitrator or arbitrators. Where a party applying u/s 11 of the 1996 Act asserts both an arbitration agreement and an agreed procedure for the appointment of the arbitral tribunal, the right to apply accrues upon the other party failing to act as required under that procedure; or upon the parties, or the two appointed arbitrators, failing to reach an agreement expected of them under that procedure; or upon a person, including an institution, failing to perform any function entrusted to him or it under that procedure. In other words, when a party applying u/s 11 of the 1996 Act asserts an arbitration agreement and an agreed procedure for the appointment of the arbitral tribunal there under, the party has to allege the breach of the agreed procedure for him to be entitled to invoke the provision. It is also of utmost significance to appreciate that an application u/s 11 of the 1996 Act would almost invariably precede any claim before any forum entitled to adjudicate upon the substance of the claim.

15. Section 8 of the 1996 Act, on the other hand, entitles a party to arbitration agreement to apply before the judicial authority seized of an action with the plea that the action is covered by an arbitration agreement. In the one case the claim is yet to be made, in the other the claim has already been lodged. Though the broader tests to be applied may be the same in either case, there is a gulf of difference between the two. The Chief Justice or his designate paves the road for the claim to be launched before the arbitral forum on the acceptance of the existence of the arbitration agreement and the recognition of either there being no agreed procedure for the implementation thereof or the breach of the agreed procedure. The Chief Justice or his designate cannot, at the time of the adjudication of the matters then available for judicial assessment, fathom or speculate on the yet unborn claim. The necessary measure that a Chief Justice or his designate may take u/s 11 of the 1996 Act would not obliterate the operation of Section 16 of the 1996 Act, though a substantial part thereof may be eclipsed thereby. The constitution or the appointment of an arbitral tribunal by the Chief Justice or his designate u/s 11 of the 1996 Act would not permit the reference of any or every head of claim to the tribunal if such claim were otherwise not covered by the arbitration agreement. Section 11 of the 1996 Act does not require the disputes to be enumerated. It is not impossible that a party applying u/s 11 of the 1996 Act secures the appointment of an arbitral tribunal, but makes a claim which travels beyond the scope of the arbitration agreement. It cannot be said that merely because the appointment of the tribunal has been made u/s 11 of the Act, it would lack the authority to assess whether the claims lodged before it are covered by the arbitration agreement. An arbitral tribunal constituted under the authority of Section 11 of the Act would still leave a substantial window for Section 16 of the Act to be taken recourse to thereafter by the arbitral tribunal depending on the nature of the claim made before it.

16. When an application is made u/s 8 of the 1996 Act, the claim is already

before the judicial authority. The judicial authority then assesses whether the entirety of the claim - not a substantial part thereof - is subject to the arbitration agreement; if it is, the judicial authority has to refer the parties to arbitration. There is a flip-side to the discretion of the judicial authority being taken away by the statute. The previous avatar of the present Act allowed some room to manoeuvre u/s 34 of the 1940 Act. The mandatory provision of Section 8 of the 1996 Act carried with it the baggage of the strict interpretation thereof. Unlike in a Section 11 case where the Chief Justice or his designate assesses the arbitration agreement or if there is a live claim there under, the judicial authority u/s 8 has only to see whether the adjudication of the entirety of the action before it would fall within the arbitrator's domain under the arbitration agreement relating thereto. It is true that both u/s 11 and u/s 8 of the 1996 Act, the existence of the arbitration agreement has to be conclusively decided, yet despite a party securing the appointment of an arbitral tribunal u/s 11 it might still have to satisfy the tribunal upon the claim being lodged that the entirety thereof is covered by the arbitration agreement. Upon a judicial authority referring the parties to arbitration following an application u/s 8 of the 1996 Act, if the same claim (without any addition thereto or enlargement of the scope thereof) is carried before the arbitral tribunal, it would have no authority to rule that a part of the claim is not covered by the arbitration agreement. That issue would already have been conclusively answered upon the application u/s 8 of the Act being allowed and attaining finality. If, however, any additional claim or matter is introduced before the arbitrator that did not form part of the action before the judicial authority which allowed the application u/s 8 of the Act, it is only such additional claim or matter that can be scrutinised as to whether it is covered by the arbitration agreement. Qualitatively, the approach for assessment of a matter u/s 11 of the 1996 Act is quite removed from that u/s 8 thereof.

17. The Plaintiffs have relied on Sukanya Holdings for the proposition that a suit cannot be bifurcated to refer a part to arbitration and to allow the rest to continue. The judgment is an authority for the principle that if the arbitration agreement does not cover the entire subject-matter of the suit or if some of the parties to the suit are not parties to arbitration agreement, an application u/s 8 of the 1996 Act cannot be allowed by carving out that part of the suit which is, and those parties which are, covered by the arbitration agreement for a reference to arbitration. In Sukanya Holdings, the cause of action against the Defendant who was not a party to the arbitration agreement was real and integral to the claim in the suit.

18. The judgments rendered in Verma Transport and Everest Holding must also be seen in the context. In Verma Transport the Appellant before the Supreme Court entered into an agreement with the Respondent firm for the handling and storage of iron and steel products of the Appellant at Ludhiana. The Appellant contended that a partner of the Respondent firm had constituted various firms and companies and obtained several consignment agency contracts from the Appellant pertaining to various centers. The Appellant alleged that such partner

had conspired with certain officials of the Appellant and obtained payments in excess of the entitlement of the consignment agents. Following an investigation by the Central Bureau of Investigation a criminal case was initiated against such partner and the concerned officials of the Appellant. The Respondent firm filed a suit seeking a permanent injunction against the Appellant from blacklisting the firm or terminating the contract on the ground that the premise on which the contract was threatened to be terminated was de hors the conditions of the contract. An application u/s 8 of the 1996 Act filed by the Appellant was rejected and the revisional application before the High Court failed since the Section 8 application was not accompanied by the original arbitration agreement or a duly certified copy thereof. The additional ground urged before the Supreme Court was that since the basis for attempting to terminate the contract was beyond the purview of the contract, it was not an arbitrable dispute under the relevant arbitration clause. Sukanya Holdings was noticed in Verma Transport and it was observed that in Sukanya Holdings there was a distinct cause of action against one of the Defendants therein who was not a party to the arbitration agreement. It was held that whatever may be the grounds for termination, since the termination of the contract was a matter covered by the arbitration agreement, the plea for referring the subject-matter of the suit to arbitration had to succeed. In Everest Holding it was observed that the decision in Sukanya Holdings came to be distinguished in Verma Transport.

19. Sukanya Holdings is not an authority for the proposition that if some parties have been imp leaded in an action with a view to avoid the enforcement of the arbitration agreement, the judicial authority in seisin of the action has to reject the application u/s 8 of the 1996 Act merely on such ground. What the judicial authority has to ascertain upon receipt of an application u/s 8 of the 1996 Act is as to the relevance of the non-party to the arbitration agreement in the scheme of the action before such authority. If a person who is not a party of an arbitration agreement is imp leaded in an action, the judicial authority is called upon to scrutinise the basis of the claim against such person on an application u/s 8 of the 1996 Act. If the cause of action of the suitor against the party to the action who is not a party to the arbitration agreement flows from the right of the suitor against a party to the arbitration agreement, the reference sought should not be denied. That follows from the scheme of the 1996 Act and the underlying thought behind it of giving primacy to the arbitration agreement. The Plaintiffs' cause of action in the present suit against the fifth Defendant is inextricably linked with the Plaintiffs' cause of action against the other Defendants and such cause of action is covered by the arbitration agreement.

20. Atul Singh and Maestro Engineers have been cited by the Plaintiffs in support of the contention that this application is not maintainable in view of the original arbitration agreement or a duly certified copy thereof not being appended to the petition. The decision in Atul Singh on such aspect was upon recognising that the existence and validity of the arbitration agreement was in serious dispute. In Maestro Engineers the view taken was that notwithstanding the subject-matter of

the suit being found to be covered by the arbitration agreement, if complicated questions of facts or law are involved or where a serious allegation of fraud is made, the civil court can refuse to refer the matter to arbitration. The judgment also found that the procedural requirement u/s 8(2) of the Act was mandatory. In Verma Transport the same question arose and the Court disregarded the objection on the ground of non-compliance of Section 8(2) of the Act on the reasoning that the existence of a valid arbitration agreement stood admitted. The judgments rendered in Verma Transport, Maestro Engineers, and Atul Singh were all rendered by two-judge benches of the Supreme Court. In both Atul Singh and Maestro Engineers, the primary ground for rejecting the applications u/s 8 of the 1996 Act was other than u/s 8(2) thereof, though the procedural requirement was found to be mandatory. It is the decision in Verma Transport, however, that is found to be more apposite in the present context since the arbitration agreement has been referred to in the plaint and the existence thereof has not been questioned by the Plaintiffs.

21. GA No. 3582 of 2010 is allowed by referring the disputes in the suit to arbitration in accordance with the arbitration clause contained in the deed of partnership of December 23, 1972. As a consequence, CS No. 195 of 2010 stands disposed of.

22. There will be no order as to costs.

23. Urgent certified photocopies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.